

# 17-2250

---

## UNITED STATES COURT OF APPEALS

*for the*

## SECOND CIRCUIT

---

National Labor Relations Board,

Petitioner.

v.

Deep Distributors of Greater N.Y., Inc.  
d/b/a The Imperial Sales Inc.,

Respondent.

APPLICATION FOR ENFORCEMENT OF THE JUNE 20, 2017 DECISION AND  
ORDER OF THE NATIONAL LABOR RELATIONS BOARD

---

### DEFERRED APPENDIX

---

**JOEL HELLER, ESQ.**  
NATIONAL LABOR RELATIONS BOARD  
ATTORNEYS FOR PETITIONER  
1015 HALF STREET SE  
WASHINGTON, DC 20570  
(202) 273-1042  
JOEL.HELLER@NLRB.GOV

**SAUL D. ZABELL, ESQ.**  
ZABELL & ASSOCIATES, P.C.  
ATTORNEYS FOR RESPONDENT  
1 CORPORATE DRIVE, SUITE 103  
BOHEMIA, NY 11716  
(631) 589-7242  
SZABELL@LABORLAWSNY.COM

---

February 23, 2018

## TABLE OF CONTENTS FOR DEFERRED APPENDIX

The National Labor Relations Board’s Application for Enforcement .....	1
Excerpts from the Transcript of the Proceedings before the National Labor Relations Board dated December 9, 2015 .....	35
Excerpts from the Transcript of the Proceedings before the National Labor Relations Board dated December 11, 2015 .....	53
Excerpts from the Transcript of the Proceedings before the National Labor Relations Board dated December 21, 2015 .....	57
Excerpts from the Transcript of the Proceedings before the National Labor Relations Board dated December 22, 2015 .....	83
Excerpts from the Transcript of the Proceedings before the National Labor Relations Board dated January 20, 2016 .....	88
Excerpts from the Transcript of the Proceedings before the National Labor Relations Board dated January 22, 2016 .....	116
Excerpts from the Transcript of the Proceedings before the National Labor Relations Board dated January 26, 2016 .....	131
General Counsel Exhibit 2(a-b): The Imperial Sales’ Employee Code of Conduct.....	134
General Counsel Exhibit 7: Complaint in the Matter of Reyes, et al. v. The Imperial Sales, Inc., et al., Case No. 15-CV-03980 (JMA) (ARL).....	136
General Counsel Exhibit 10(a-b): Transcript of Meetings dated March 10, 2015 and July 15, 2015.....	149
General Counsel Exhibit 11(a-b): iPhone “screenshots” of Voice Memos dated March 10, 2015 and July 15, 2015 .....	168
General Counsel Exhibit 22: Stipulated Election Agreement dated February 26, 2015.....	170

Administrative Law Judge Steven Adams' Decision and Order dated May 6, 2016.....	174
Administrative Law Judge Steven Adams' May 25, 2016 Order Modifying his May 6, 2016 Order.....	219
Respondent's Exceptions to the Decision of the Administrative Law Judge dated June 22, 2016 .....	228

**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**  
**AGENCY APPEAL PRE-ARGUMENT STATEMENT (FORM C-A)**

☒ APPLICATION FOR ENFORCEMENT

☐ PETITION FOR REVIEW

2. PLEASE TYPE OR PRINT.

3. STAPLE ALL ADDITIONAL PAGES.

CAPTION:  National Labor Relations Board  V.  Deep Distributors of Greater N.Y., Inc. d/b/a The Imperial Sales, Inc.		AGENCY NAME:  NLRB		AGENCY NO.:  29-CA-147909	
		DATE THE ORDER UPON WHICH REVIEW OR ENFORCEMENT IS SOUGHT WAS ENTERED BELOW:  June 20, 2017		ALIEN NO : (Immigration Only)	
		DATE THE PETITION OR APPLICATION WAS FILED:  July 21, 2017		Is this a cross-petition for review / cross-application for enforcement?  <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
Contact Information for Petitioner(s) Attorney:		Counsel's Name:  Linda Dreeben		Address:  1015 Half Street SE Washington, DC 20570	
		Telephone No.:  (202) 273-2960		Fax No.:  (202) 273-0191	
		E-mail:  appellatecourt@ nlrb.gov			
Contact Information for Respondent(s) Attorney:		Counsel's Name:  Saul Zabell		Address:  1 Corporate Drive, Suite 103 Bohemia, NY 11716	
		Telephone No.:  (631) 589-7242		Fax No.:  szabell@laborlawsny.com	
		E-mail:  szabell@laborlawsny.com			
JURISDICTION OF THE COURT OF APPEALS (provide U.S.C. title and section):  29 U.S.C. 160(e)		APPROX. NUMBER OF PAGES IN THE RECORD:  1457		APPROX. NUMBER OF EXHIBITS IN THE RECORD:  33	
		Has this matter been before this Circuit previously? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
		If Yes, provide the following:			
		Case Name:			
		2d Cir. Docket No.:		Reporter Citation: (i.e., F.3d or Fed. App.)	
<b>ADDENDUM "A": COUNSEL MUST ATTACH TO THIS FORM: (1) A BRIEF, BUT NOT PERFUNCTORY, DESCRIPTION OF THE NATURE OF THE ACTION; (2) THE RESULT BELOW; AND (3) A COPY OF ALL RELEVANT OPINIONS/ORDERS FORMING THE BASIS FOR THIS PETITION FOR REVIEW OR APPLICATION FOR ENFORCEMENT.</b>					
<b>ADDENDUM "B": COUNSEL MUST ATTACH TO THIS FORM: (1) THE RELIEF REQUESTED; (2) A LIST OF THE PROPOSED ISSUES; AND (3) THE APPLICABLE APPELLATE STANDARD OF REVIEW FOR EACH PROPOSED ISSUE.</b>					
<b>PART A: STANDING AND VENUE</b>					
<b>STANDING</b>			<b>VENUE</b>		
PETITIONER / APPLICANT IS: <input checked="" type="checkbox"/> AGENCY <input type="checkbox"/> OTHER PARTY <input type="checkbox"/> NON-PARTY (SPECIFY STANDING):			COUNSEL MUST PROVIDE IN THE SPACE BELOW THE FACTS OR CIRCUMSTANCES UPON WHICH VENUE IS BASED:  The unfair labor practices occurred in Bethpage, New York.		

**IMPORTANT. COMPLETE AND SIGN REVERSE SIDE OF THIS FORM.**



**PART B: NATURE OF ORDER UPON WHICH REVIEW OR ENFORCEMENT IS SOUGHT**  
(Check as many as apply)

**TYPE OF CASE:**

_____	ADMINISTRATIVE REGULATION/ RULEMAKING	_____	IMMIGRATION-includes denial of an asylum claim
_____	BENEFITS REVIEW	_____	IMMIGRATION-does NOT include denial of an asylum claim
X _____	UNFAIR LABOR	_____	TARIFFS
_____	HEALTH & SAFETY	_____	OTHER:
_____	COMMERCE	_____	(SPECIFY)
_____	ENERGY		

1. Is any matter relative to this petition or application still pending below? <input type="checkbox"/> Yes, specify: _____ <input checked="" type="checkbox"/> No			
2. To your knowledge, is there any case presently pending or about to be brought before this Court or another court or administrative agency which:			
(A)	Arises from substantially the same case or controversy as this petition or application ?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
(B)	Involves an issue that is substantially similar or related to an issue in this petition or application ?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If yes, state whether <input type="checkbox"/> "A," or <input type="checkbox"/> "B," or <input type="checkbox"/> both are applicable, and provide in the spaces below the following information on the <i>other</i> action(s):			
Case Name:	Docket No.	Citation:	Court or Agency:
Name of Petitioner or Applicant:			

Date: 8/7/17	Signature of Counsel of Record: /s/ Linda Dreeben
-----------------	--

**NOTICE TO COUNSEL**

**Once you have filed your Petition for Review or Application for Enforcement, you have only 14 days in which to complete the following important steps:**

1. Complete this Agency Appeal Pre-Argument Statement (Form C-A); serve it upon your adversary, and file it with the Clerk of the Second Circuit in accordance with LR 25.1.
2. Pay the \$500 docketing fee to the Clerk of the Second Circuit, unless you are authorized to prosecute the appeal without payment.

**PLEASE NOTE: IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN 14 CALENDAR DAYS, YOUR PETITION FOR REVIEW OR APPLICATION FOR ENFORCEMENT WILL BE DISMISSED. SEE LOCAL RULE 12.1.**

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**Addendum A to Form C-A**

**National Labor Relations Board v. Deep Distributors of Greater N.Y.,  
Inc. d/b/a The Imperial Sales, Inc.  
2d Cir. No. 17-2250**

**(1) Nature of the Action**

The National Labor Relations Board applies to this Court for enforcement of its Order issued against Deep Distributors of Greater N.Y., Inc. d/b/a The Imperial Sales, Inc., on June 20, 2017. The Board found that Deep Distributors violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), by threatening employees with discharge and other reprisals if they selected union representation, giving the impression that union activities were under surveillance, telling employees it would be futile to select union representation, interrogating and threatening employees, implementing new work rules in retaliation for employees' protected activities, and threatening employees for participating in Board proceedings. The Board also found that Deep Distributors violated Section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), by discharging eight employees because they engaged in union and other protected activities.

**(2) The Result Below**

The Board found that Deep Distributors violated Section 8(a)(1) and (3) of the NLRA, 29 U.S.C. § 158(a)(1), (3).

**(3) A Copy of the Board's Decision is Attached**

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**Addendum B to Form C-A**

**National Labor Relations Board v. Deep Distributors of Greater N.Y.,  
Inc. d/b/a The Imperial Sales, Inc.  
2d Cir. No. 17-2250**

**(1) Relief Requested**

The National Labor Relations Board applies to this Court for enforcement of its Order issued against Deep Distributors of Greater N.Y., Inc. d/b/a The Imperial Sales, Inc., on June 20, 2017. The Board's Order requires, inter alia, that Deep Distributors cease and desist from the violations found and from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under the NLRA. Affirmatively, the Order requires that Deep Distributors make whole and offer to reinstate the eight discharged employees, rescind the unlawful work rules, post and read aloud a remedial notice, publish the remedial notice in three publications of general local interest and circulation, and furnish the union, upon request, with lists of the names, addresses, and classifications of employees.

**(2) Proposed Issues**

Whether substantial evidence in the record supports the Board's findings that Deep Distributors unlawfully discharged employees for engaging in union and other protected activities, threatened employees with discharge and other reprisals if they selected union representation, gave the impression that union activities were under surveillance, told employees it would be futile to select union representation, interrogated and threatened employees, implemented new work rules in retaliation for employees' protected activities, and threatened employees for participating in Board proceedings.

**(3) Applicable Standard of Review**

This Court will uphold the Board's factual findings if they are supported by substantial evidence in the record as a whole. 29 U.S.C. § 160(e); *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1427 (2d Cir. 1996). The Board's legal determinations will be upheld if they have a "reasonable basis in law" and are "not arbitrary and capricious." *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d

Cir. 2008) (internal quotations omitted). The Board's selection of a remedy is reviewed for abuse of discretion. *NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 119 (2d Cir. 2001).

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Deep Distributors of Greater NY d/b/a The Imperial Sales, Inc. and United Workers of America, Local 660 and Henry Hernandez.** Cases 29-CA-147909, 29-CA-157108, and 29-RC-146077

June 20, 2017

**DECISION AND ORDER**

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE  
AND MCFERRAN

On May 6, 2016, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and cross-exceptions with a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as discussed below and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

This consolidated unfair labor practice and representation case involves allegations that the Respondent violated Section 8(a)(1) and (3) during an organizing campaign. The Respondent also filed objections alleging that certain conduct by the Union warrants setting aside the

election, which the Union won by a vote of 9 to 5, with 5 challenged ballots, a potentially determinative number. The judge found that the Respondent violated Section 8(a)(1) of the Act by threatening employees with termination and unspecified reprisals, giving employees the impression their protected activities were under surveillance,<sup>3</sup> interrogating employees,<sup>4</sup> promulgating new work

<sup>3</sup> In adopting the judge's finding that the Respondent violated the Act when Amjad Malik gave employees the impression that their protected concerted conduct was under surveillance, we disregard the Respondent's bare exception to the judge's finding. In doing so, we note that not only did the Respondent fail to brief the exception, but the Respondent failed to cite to any portion of the judge's decision addressing the surveillance issue and failed to cite record evidence in support of its exception. *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005) ("The [r]espondent merely recites the findings excepted to and cites to the judge's decision without stating, either in its exceptions or its supporting brief, on what grounds the purportedly erroneous findings should be overturned. . . . [W]e find, in accordance with Sec. 102.46(b)(2), that the [r]espondent's exceptions . . . should be disregarded."), enfd. 456 F.3d 265 (1st Cir. 2006). See also, *New Concept Solutions, LLC*, 349 NLRB 1136, 1136 fn. 2 (2007).

Moreover, we find no merit in the Respondent's exception to the judge's finding that Malik was a supervisor. The record supports the judge's finding that Malik had authority to assign and direct employees, approve time off, and discipline employees. See *Oakwood Healthcare*, 348 NLRB 686, 687 (2006). In particular, we note the un rebutted testimony that Malik disciplined one employee and terminated two others. To the extent that evidence of Malik's authority to terminate employees rested upon hearsay testimony, there were no hearsay objections made by the Respondent at trial and it filed no exceptions on that basis.

In concurring with his colleagues' finding that Amjad Malik is a supervisor under Sec. 2(11) of the Act, Chairman Miscimarra relies solely on Malik's possession of authority to discipline and discharge employees. Chairman Miscimarra disagrees, however, that Malik's February 17, 2015 comments to employees Jose Michel Torres and Jose Wilfredo Argueta created the impression that those employees' union activities were under surveillance. Chairman Miscimarra recognizes that under Sec. 102.46(b)(2) of the Board's Rules and Regulations, the Board may disregard an unargued exception. The Board is not required to do so, however, and Chairman Miscimarra believes it is appropriate to address unargued exceptions in certain circumstances, including where the record evidence is insufficient to support an unfair labor practice finding. See *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 180, slip op. at 6-7 fn. 5 (2015) (Member Miscimarra, dissenting in part). That is the situation here. The record shows that Jose Michel Torres and Jose Wilfredo Argueta openly engaged in union activity by speaking with the Union's representative while standing next to his vehicle, which was parked directly across the street from the Respondent's facility—"in direct view of the Respondent's business," as the judge found—and on which a large "Local 660" flag was prominently displayed. All this was readily visible to anyone looking out of the Respondent's office window. When union activity is conducted openly, it is unreasonable to conclude that statements indicating that the activity has been observed create an impression of surveillance. See, e.g., *Waste Management of Arizona*, 345 NLRB 1339, 1339-1340 (2005) (manager did not create impression of surveillance by telling employee "he knew that employees had held a union meeting," where the General Counsel did not show that the meeting was held in secret, and "given the various other ways in which [the manager] might have learned of the nonsecret meeting"); *Michigan Roads Maintenance Co.*,

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, several of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

<sup>2</sup> We shall modify the judge's recommended Order in accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and to conform to our findings and standard remedial language. We shall substitute a new notice to conform to the Order as modified.

In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in rel. part, *King Soopers, Inc. v. NLRB*, \_\_\_ F.3d \_\_\_, (D.C. Cir. June 9, 2017), we shall also order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). For the reasons stated in his separate opinion in *King Soopers*, supra at 12-16, Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

rules in response to Section 7 activity, telling employees it would be futile to select the Union as their collective-bargaining representative, and threatening employees with deportation for testifying at the Board hearing.<sup>5</sup> The judge also found that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating eight employees for engaging in union and protected concerted activity. The judge ordered some, but not all, of the special remedies requested by the General Counsel.<sup>6</sup> In the represen-

344 NLRB 617, 617 fn. 4 (2005) (manager did not create impression of surveillance by telling employee who had just finished placing union flyers on vehicles parked in employer's parking lot not to "start that union stuff on this property," where the employee's union activity was conducted "in the open"). Moreover, Malik did not reveal detailed knowledge of the employees' union activities. Cf. *United Charter Service*, 306 NLRB 150, 151 (1992) (even assuming employees' union meeting at a restaurant was common knowledge, manager created an impression of surveillance when he "went into detail about the extent of the [meeting] and the specific topics [employees] discussed"). Accordingly, Chairman Miscimarra would dismiss the allegation that the Respondent unlawfully created an impression of surveillance.

<sup>4</sup> Chairman Miscimarra agrees with his colleagues that the Respondent, by its manager Tony Bindra, coercively interrogated employee Roberto Reyes in violation of Sec. 8(a)(1) of the Act when Bindra questioned Reyes about an FLSA lawsuit that had been filed on behalf of Reyes and his fellow employees. He finds it unnecessary to pass on the judge's finding that Bindra's questions about the lawsuit posed during a subsequent employee meeting also violated Sec. 8(a)(1) because this additional finding does not affect the remedy and is therefore merely cumulative.

<sup>5</sup> The Respondent initially contested the General Counsel's allegation that it violated Sec. 8(a)(1) of the Act by threatening employees with unspecified reprisals and discharge and telling employees that it would be futile to select the Union as their collective-bargaining representative. When confronted with an audio recording of these threats at the hearing, the Respondent amended its answer to the complaint and admitted the violations. Although the Respondent subsequently filed exceptions to the judge's finding of these violations, it failed to present any supporting argument. We find, pursuant to Sec. 102.46(b)(2) of the Board's Rules and Regulations, that these exceptions should be disregarded. See, e.g., *New Concept Solutions, LLC*, supra, 349 NLRB at 1136 fn. 2.

<sup>6</sup> The judge recommended, among other remedies, that the Respondent be ordered to publish the Notice to Employees in three publications of local interest, twice a week, for a period of 8 weeks, and to supply the Union with the names and addresses of current bargaining-unit employees, updating that list for a period of 2 years. Contrary to our colleague, we find these remedies to be justified based on the number and serious nature of the violations found. We also note that on July 5, 2016, the United States District Court for the Eastern District of New York granted temporary injunctive relief under Sec. 10(j), ordering, among other things, immediate reinstatement of five discharged employees. *Drew-King v. Deep Distributors of Greater NY, Inc.*, 194 F. Supp.3d 191 (E.D.N.Y. 2016). The Respondent has not appealed the district court's order. The General Counsel, asserting that the Respondent has not fully complied with the order, has petitioned the court to hold the Respondent in contempt. These circumstances provide further support for the enhanced publication remedy. See *Ishikawa Gasket America*, 337 NLRB 175, 176 (2001) (Board may impose additional remedies "where required by the particular circumstances of a case."), *enfd.* 354 F.3d 534 (6th Cir. 2004).

tation case, the judge recommended overruling the Respondent's objections.<sup>7</sup>

We agree with the judge's findings for the reasons set forth in his decision as further discussed below. In addition, as discussed below, we will refer Respondent's counsel to the Board's Investigating Officer in connection with his apparent aggravated misconduct at the hearing in this case.

1. As stated above, the judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating eight employees: Jose Michel Torres, Jose Martin Torres, Jose Wilfreda Argueta, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon. For the reasons stated by the judge, we affirm his findings that the Respondent violated the Act by discharging Jose Michel Torres, Jose Martin

Chairman Miscimarra does not believe that a publication remedy is warranted in the circumstances of this case. Although he agrees that the Respondent has committed numerous unfair labor practices warranting a broad cease-and-desist order and a notice-reading remedy, Chairman Miscimarra does not believe that the violations in this case are comparable to the extreme and recurring unlawful conduct in the rare cases in which a publication remedy has been ordered by the Board. See, e.g., *Pacific Beach Hotel*, 361 NLRB No. 65 (2014) (publication remedy ordered where recidivist respondents were found to have violated multiple provisions of the Act, the violations were severe and pervasive and continued over the course of a decade, and the respondents exhibited open contempt for the Act's requirements); *Three Sisters Sportswear Co.*, 312 NLRB 853 (1993) (publication remedy ordered where recidivist respondent committed flagrant and repeated violations of the Act, including laying off and discharging pro-union employees, verbally abusing and physically assaulting employees, blocking employees from exiting its office, instructing employees not to speak to other employees, and having supervisors clap their hands when employees looked up from their work), *enfd. mem.* 55 F.3d 684 (D.C. Cir. 1995), *cert. denied* 516 U.S. 1093 (1996). If the Respondent has failed to comply with the district court's order in a 10(j) proceeding, it is entirely appropriate for the General Counsel to seek a court order holding the Respondent in contempt. But this is a matter for the district court to address, and Chairman Miscimarra does not believe the Board should rely in part on a mere assertion by the General Counsel regarding the extent of the Respondent's compliance with the district court's order to support ordering a publication remedy in this proceeding. Further, Chairman Miscimarra would order a names-and-addresses remedy conditionally, the condition being that the revised tally of ballots show that the Union failed to receive a majority of the valid ballots cast. If the revised tally shows that the Union won the election, it will be certified as the unit employees' bargaining representative and entitled to ask the Respondent to furnish it with information regarding the unit employees it represents. Because such information is presumptively relevant to a union's duties as collective-bargaining representative, the Respondent would be duty bound to provide it, rendering a names-and-addresses remedy unnecessary.

<sup>7</sup> The judge recommended remanding the representation case to the Regional Director to open and count four of the challenged ballots and issue a revised tally. There were no exceptions to the judge's resolution of the challenges (beyond the supervisory status of Amjad Malik, discussed above).



Torres, and Jose Wilfredo Argueta.<sup>8</sup> In analyzing the terminations of the other five employees, the judge found that the Respondent's purported reason for the discharges—that the employees refused to sign new work rules—was pretextual, and that the actual reason was that the employees had engaged in union activity and protected concerted activity. In the alternative, the judge found that the Respondent violated the Act by terminating the employees for refusing to sign the unlawfully promulgated work rules.

We agree with the judge that the terminations were unlawful, but we rely only on the finding that the Respondent discharged these employees because they refused to sign unlawfully promulgated rules.<sup>9</sup> In adopting that finding, we do not rely on the judge's application of *Tuscaloosa Quality Foods*, 318 NLRB 405, 411 (1995). Instead, we rely on *Long Island Association for AIDS Care, Inc.*, 364 NLRB No. 28, slip op. at 1–2 (2016), in which the Board found that the employer violated Section 8(a)(1) by discharging an employee for refusing to consent to an unlawful rule.

2. In adopting the judge's recommendation to overrule the Respondent's election objections, we agree with the judge's determination that the alleged objectionable conduct—a confrontation between the union president and two of the Respondent's agents—would not “reasonably tend to interfere with the employees' free and uncoerced choice in the election.”<sup>10</sup> *Robert Orr-Sysco Food Services, LLC*, 338 NLRB 614, 615 (2002) (citing *Baja's*

*Place*, 268 NLRB 868 (1984)). The judge found that Union President Gilberto Mendoza, Respondent's President, Danny Bindra, and the Respondent's attorney, Saul D. Zabell, exchanged words and had very brief physical contact when Mendoza attempted to exit the election area in order to verify that the Respondent's video surveillance cameras were shut down before voting began.<sup>11</sup> We find that this single interaction would not tend to affect the election results, particularly in the absence of evidence that any employee other than the Union's own observer was aware of it before voting.<sup>12</sup>

3. The record here suggests that during the course of the hearing, Respondent's attorney, Zabell, engaged in a persistent pattern of aggravated misconduct that interfered with the judge's attempts to conduct the hearing.<sup>13</sup> The judge put Zabell “on notice that this is an admonishment and a reprimand” on four separate occasions.<sup>14</sup>

After reviewing the record, we have concluded that it is appropriate under Section 102.177(d) and (e)(1) of the Board's Rules to bring the allegations concerning Mr. Zabell to the attention of the Investigating Officer for investigation and such disciplinary action as may be appropriate.<sup>15</sup> See *Bethlehem Temple Learning Center, Inc.*, 330 NLRB 1177, 1177 fn. 3 (2000) (Board referred alleged attorney misconduct to the Investigating Officer for appropriate disciplinary action, based on judge's recommendation); see also *McAllister Towing & Transpor-*

<sup>8</sup> Chairman Miscimarra agrees with the judge and his colleagues that the Respondent violated Sec. 8(a)(3) and (1) of the Act when it discharged employees Jose Michel Torres, Jose Martin Torres, and Jose Wilfredo Argueta. As evidence that the employees' union activities were a motivating factor in the Respondent's decision to discharge these three employees, Chairman Miscimarra relies on the statements made by the Respondent's warehouse manager Herbert Miller just 4 days after these employees were discharged, in which Miller told employees it would be futile to select the Union to represent them and threatened employees with discharge and unspecified reprisals if they selected the Union to represent them. However, Chairman Miscimarra believes the Respondent did not create the impression that it was engaging in surveillance of employees' union activities. Accordingly, unlike the judge and his colleagues, Chairman Miscimarra does not rely on the creation of an impression of surveillance as evidence of the Respondent's anti-union animus.

<sup>9</sup> We do not pass on the judge's finding that the employees were discharged because they had engaged in union and other protected concerted activity.

Member Pearce joins his colleagues in adopting the judge's finding that the Respondent violated the Act by terminating employees for refusing to sign unlawfully promulgated rules. Member Pearce would also adopt the judge's finding that the Respondent terminated the five employees because they engaged in union and other protected concerted activity.

<sup>10</sup> In the absence of exceptions, we adopt the judge's decision to overrule Respondent's Objection 1.

<sup>11</sup> It is undisputed that the stipulated election agreement required that the video surveillance cameras be shut down during the election. However, it is not clear that Mendoza had the right to exit the election area and enter the facility to verify that the cameras were disabled. In analyzing this objection, we assume he was not so authorized.

<sup>12</sup> We do not rely on the judge's finding that “nine votes to five is not a close vote.”

<sup>13</sup> Zabell's apparent misconduct included the following unjustified and repeated behavior: bullying and intimidating the Respondent's witnesses, including by making threats to report them to immigration authorities; falsely accusing the Union's president of threatening Zabell's safety and referring to him as a “felon”; summoning federal marshals to the courtroom and insisting on a police presence throughout the hearing; accusing the General Counsel of misconduct; and questioning the trial judge's competence and authority after rulings had been made.

<sup>14</sup> At one point during the hearing, the judge stated: “Mr. Zabell, I have never seen such misconduct engaged in by an attorney in these proceedings in my 43 years with the Board and 35 years as a judge. It's all on the record. I refer you to Sec. 102.177 of the Board's rules and regulations. You are put on notice that this is an admonishment and a reprimand. Your conduct before me, before we broke for lunch was improper, contemptuous, unprofessional, and constituted misconduct of an aggravated character. It will not be tolerated.”

<sup>15</sup> Accordingly, we shall further modify the judge's recommended Order to include language referring the alleged misconduct to the Investigating Officer for the purpose of conducting an investigation of the alleged misconduct and performing other duties consistent with Sec. 102.177(e)(1) of the Board's Rules and Regulations.

*tation Co.*, 341 NLRB 394, 398 fn. 7 (2004) (same),  
enfd. 156 Fed. Appx. 386 (2d Cir. 2005).

ORDER

The National Labor Relations Board orders that the Respondent, Deep Distributors of Greater NY d/b/a The Imperial Sales, Inc., Bethpage, New York, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or otherwise discriminating against employees for engaging in union activity and/or protected concerted activity.

(b) Giving its employees the impression that their union activities were under surveillance by the Respondent.

(c) Threatening employees with unspecified reprisals if they selected the United Workers of America, Local 660 (the Union) as their collective-bargaining representative.

(d) Telling its employees that it would be futile to select the Union as their collective-bargaining representative.

(e) Threatening employees with discharge if they selected the Union as their collective-bargaining representative.

(f) Interrogating its employees about their involvement in a Fair Labor Standards Act lawsuit.

(g) Threatening employees with unspecified reprisals because of their involvement in the filing of a Fair Labor Standards Act lawsuit.

(h) Implementing new work rules because employees engage in union and/or protected concerted activity.

(i) Discharging employees for refusing to sign unlawfully promulgated work rules and disciplinary rules regarding cell phone use and lateness.

(j) Threatening employees with legal action in retaliation for participating in a Board hearing or because of their union activity.

(k) Threatening to report employees to government authorities in order to intimidate witnesses or to discourage them from participating in Board processes.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the judge's remedy as modified herein, plus reasonable search-for-work and interim employment expenses.

(c) Compensate Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amounts of backpay are fixed, either by agreement or Board order, reports allocating the backpay awards to the appropriate calendar year(s) for each employee.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon, and within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(e) Rescind the "Employee Code of Conduct" that was implemented on July 21, 2015, and notify the employees that it has done so.

(f) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which shall be scheduled to ensure the widest possible attendance of employees, at which the attached "Notice to Employees" shall be read to employees by a responsible management official in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or at the Respondent's option by a Board agent in the presence of a responsible management official and, if the Union so desires, an agent of the Union.

(g) Within 14 days from the date of this Order, publish in three publications of general local interest and circulation copies of the attached Notice to Employees, signed by the Respondent's general manager Tony Bindra or his successor, and do so at its expense. Such Notice shall be published twice weekly for a period of 8 weeks. The publications shall be determined by the Regional Director for Region 29 and need not be limited to newspapers so long as they will achieve broad coverage of the area.

(h) Upon request of the Union, immediately furnish it with lists of the names, addresses, and classifications of all the Respondent's employees as of the latest available payroll date, and furnish a corrected, current list to the



DEEP DISTRIBUTORS OF GREATER NY D/B/A THE IMPERIAL SALES, INC.

5

Union at the end of each 6 months thereafter during a period of 2 years following the entry of this Order.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Bethpage, New York, copies of the attached notice marked "Appendix."<sup>16</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2015.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the alleged misconduct by the Respondent's counsel, Saul D. Zabell, as set forth above, is referred to the Investigating Officer, the Associate General Counsel, Division of Operations-Management, pursuant to Section 102.117(e) of the Board's Rules.

IT IS FURTHER ORDERED:

1. The Objections to the election are overruled.
2. The proceedings in Case No. 29-RC-146077 are remanded to the Regional Director for Region 29. She is

<sup>16</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

directed to open and count the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh, issue a revised tally of ballots, and issue the appropriate certification.

Dated, Washington, D.C. June 20, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

##### NOTICE TO EMPLOYEES

##### POSTED BY ORDER OF THE

##### NATIONAL LABOR RELATIONS BOARD

##### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend, or otherwise discriminate against employees for engaging in union activity and/or protected concerted activity.

WE WILL NOT give employees the impression that their union activities are under surveillance.

WE WILL NOT threaten employees with unspecified reprisals if they select the United Workers of America, Local 660 (the Union) as their collective-bargaining representative.

WE WILL NOT tell our employees that it would be futile to select the Union as their collective-bargaining representative.

WE WILL NOT threaten employees with discharge if they select the Union as their collective-bargaining representative.

WE WILL NOT interrogate employees about their involvement in a Fair Labor Standards Act lawsuit.

WE WILL NOT threaten employees with unspecified reprisals because of their involvement in the filing of a Fair Labor Standards Act lawsuit.

WE WILL NOT implement new work rules because employees engage in union and/or protected concerted activity.

WE WILL NOT discharge employees for refusing to sign unlawfully promulgated work rules and disciplinary rules regarding cell phone use and lateness.

WE WILL NOT threaten employees with legal action in retaliation for participating in a Board hearing or because of their union activity.

WE WILL NOT threaten to report employees to government authorities in order to intimidate witnesses or to discourage them from participating in Board processes.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL rescind the "Employee Code of Conduct" that was implemented on July 21, 2015, and notify the employees that we have done so.

WE WILL, upon request of the Union, immediately furnish it with lists of the names, addresses, and classifications of all our employees as of the latest available payroll date, and WE WILL furnish a corrected, current list to the Union at the end of each 6 months thereafter during a period of 2 years following the entry of the Board's Order.

DEEP DISTRIBUTORS OF GREATER NY, D/B/A  
THE IMPERIAL SALES, INC.

The Board's decision can be found at [www.nlrb.gov/case/29-CA-147909](http://www.nlrb.gov/case/29-CA-147909) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Henry J. Powell and Emily A. Cabrera, Esqs.*, for the General Counsel.

*Saul D. Zabell, Esq. (Zabell & Associates, P.C.)*, of Bohemia, New York, for the Respondent.

*Sheri Preece, Esq. (Bryan C. McCarthy, Esq. & Associates, P.C.)* of Brewster, New York, for the Union.

#### DECISION

#### STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on charges and amended charges filed by United Workers of America, Local 660 (Union) in Case No. 29-CA-147909, and based on charges and amended charges filed by Henry Hernandez in No. 29-CA-157108, an amended consolidated complaint was issued against Deep Distributors of Greater NY d/b/a The Impe-

rial Sales (Respondent or Employer) on October 30, 2015.<sup>1</sup>

The complaint, as amended at the hearing, alleges that the Respondent (a) by its agent Amjad Malik, gave employees the impression that their union activities were under surveillance and (b) by its Manager Miller, threatened employees with unspecified reprisals if they selected the Union as their representative; told employees that it would be futile to select the Union as their collective-bargaining representative, and threatened employees with discharge if they selected the Union as their representative.

It is also alleged that on March 6, 2015, the Respondent discharged Jose Wilfredo Argueta, Jose Martin Torres, and Jose Michel Torres because they joined and assisted the Union and engaged in concerted activities.

It is further alleged that in about July, 2015, the Respondent's employees including Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon, engaged in concerted activities with other employees by filing a lawsuit which alleged that the Respondent was violating the Fair Labor Standards Act (FLSA).

It is alleged that on about July 14, 2015, by Tony Bindra, interrogated employees about their involvement in the FLSA lawsuit and threatened them with unspecified reprisals because of their involvement in the filing of that lawsuit.

It is additionally alleged that on about July 21, 2015, the Respondent unlawfully implemented new work rules and discipline regarding cell phone use and lateness, and that on that day, the Respondent discharged Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon because they filed the FLSA lawsuit.

Finally, it is alleged that on about December 9, Respondent, by its Attorney Saul D. Zabell, while in a Board hearing room (a) threatened employees with legal action in retaliation for participating in a Board hearing and because of their union activity and (b) threatened to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

On October 20, 2015, the Regional Director issued a Report on Objections and Challenges, consolidating for hearing the alleged unfair labor practice cases with objections to the election filed by the Employer. At an election conducted on March 24, 2015, of the 20 eligible voters, 9 votes were cast for the Union and 5 votes were cast against the Union. Five ballots were challenged. The ballots cast by Jose Wilfredo Argueta, Jose Martin Torres, and Jose Michael Torres, the alleged discriminatees in the unfair labor practice case, were challenged by the Employer. The ballots cast by Amjad Malik and Manjit Singh were challenged by the Union.

The Respondent's answer, as amended at the hearing, denied the material allegations of the complaint, and a hearing was

<sup>1</sup> The charge, first amended charge and second amended charge in Case No. 29-CA-149709 were filed by the Union on March 10, 12, and August 31, 2015, respectively. The charge, first amended charge, and second amended charge in Case No. 29-CA-157108 were filed by Henry Hernandez on July 31, September 24 and November 3, 2015, respectively.

held before me in Brooklyn, New York, on December 9, 11, 21-23, 2015, and January 20, 22, 26-27, 2016.<sup>2</sup>

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent admitted that from January 1, 2013, to the present, it has been a domestic corporation having an office and place of business at 999 South Oyster Bay Road, Bethpage, New York, and with a former place of business at 60 Gordon Drive, Syosset, New York. It further admits that it has been engaged in the nonretail sale of beauty and appliance and housewares products. The Respondent admits that during the past year, it purchased and received at its combined Bethpage and Syosset, New York facility, goods valued in excess of \$50,000 directly from points outside New York State. The Respondent admits, and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.<sup>3</sup>

The Respondent also admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

##### II. THE RESPONDENT'S HIERARCHY

Chandeep (Danny) Bindra is the owner of the Respondent. His brother, Tony Bindra, is its general manager. Herbert Miller is the warehouse manager and an admitted statutory supervisor. Miller is in charge of the daily operations of the warehouse. The complaint alleges and the Respondent denies that Amjad Malik is a statutory supervisor or agent.

The Respondent purchases beauty products and electronics and appliances which it stores in its warehouse. Retail stores purchase those products from the Respondent which then ships them to retailers and to on-line purchasers.

The Respondent's approximately 20 warehouse employees pick the orders requested by its customers by locating them on the warehouse shelves and bringing them to the shipping department where they are checked by Miller and then prepared for delivery and sent out. The employees operate fork lift trucks to store and to pick the items.

##### A. The Alleged Supervisory and Agency Status of Amjad Malik

Miller is in charge of the electronic and appliances section of the warehouse. Malik is in charge of the beauty and personal

<sup>2</sup> On February 1, 2016, I granted the General Counsel's motion to quash subpoenas served by the Respondent on certain employees. The Respondent sought to examine them on certain amendments to the complaint made by the General Counsel. My Order granting the motion to quash the subpoenas was received in evidence as GC Exh. 26.

<sup>3</sup> The Respondent argued at the hearing that Deep Distributors of Greater New York and The Imperial Sales, Inc., are separate entities. This claim has no merit. The Respondent amended its answer to admit that Deep Distributors of Greater New York and The Imperial Sales having its facility in Bethpage is a statutory employer.

items products. Six or seven employees worked in each department.

Employee Jose Torres stated that when he began work in 2011 or 2012, Tony Bindra told him that Malik was his supervisor. Jose Torres and Argueta testified similarly that Malik told them what job they would be performing, and during their employment, gave them daily job assignments. If they were late to work or wanted a day off they called Malik. On those occasions, Malik approved the requests.

Jose Torres testified that about 2 or 3 years before the hearing, he saw Malik speak to employee Ramon Muncho but did not know what they said because he was too far away. Immediately thereafter, Muncho told Torres that he was fired. Muncho left the premises and did not return. Similarly, Argueta testified that, about 3 or 4 years ago, he saw Malik argue with Jose Ramone Argueta who then left the premises. Argueta asked Ramone what happened and Ramone said that Malik had fired him. The Respondent had no written disciplinary records of any employees and, accordingly, these alleged discharges could not be confirmed with documentary evidence. Employee Javier Reyes stated that he considered Malik as a supervisor because he followed and observed the workers, gave them orders, and worked at the computer in his office.

Employee Marvin Hernandez and Roberto Reyes stated that when Miller was not at the premises Malik was in charge, and, according to Reyes, at those times Malik directed the workers as to their job tasks. Miller testified that when he is not present he does not know who assigns the work.

Argueta testified that in about September, 2014, he was filling an order when Malik told him to do another job. Argueta testified that he did not hear Malik and, apparently, ignored him. Malik warned him that that he would not get any more chances if he made any more mistakes.

The Respondent had no responsive documents to General Counsel's subpoena regarding the supervisory status of Malik. Malik did not testify.

Tony Bindra testified that Malik uses a computer to print the order pick sheets. He is the only employee who has that task because he is the only worker who knows how to use the computer, and read English. Similarly, because of his fluency in English, Malik is the only employee who receives merchandise from delivery trucks. According to Bindra, apart from these duties, Malik is a warehouse worker with the same responsibilities as the other warehouse employees.

Bindra gave contradictory testimony. He first testified that Malik signed orders to purchase products but then, following an objection by Attorney Zabell, testified that he did not. Tony Bindra denied that Malik possessed any supervisory responsibilities. He stated that he has no authority to hire, discharge, or recommended discharge. Bindra conceded that he shares an office with him but later stated that he has no office within the warehouse.

Malik occupies a position of trust. Miller testified that Malik is his "main helper." He is the only employee who has a key to a room, called the blade room, where expensive merchandise is kept. Bindra trusts him with those costly goods, stating that he did not want others to possess a key because items may be missing.

### III. THE UNION'S ORGANIZATIONAL CAMPAIGN

Employee Henry Hernandez and his coworkers became interested in joining a union, and Hernandez contacted Union Agent Wester Fabres. Beginning in early January, 2015, Hernandez and his fellow workers met each week with Fabres, and attended meetings with the Union.

In early January, 2015 Fabres parked his vehicle across the street from the Respondent's shop in direct view of the Respondent's business. The vehicle bore a large flag with the legend "Local 660" prominently displayed on the car.

Employees Javier Reyes, Roberto Reyes, Argueta, and Sabilon spoke occasionally with Fabres at his car for a few minutes. Javier Reyes stated that in late February, after speaking with Fabres and entering the building, he heard Miller ask Roberto Reyes "what happened outside."

Marvin Hernandez stated that as he and other employees entered the warehouse through the office, the door was open and he saw Tony Bindra and Miller standing at the window looking outside during the time that Fabres' car was located across the street from the facility.

Manager Miller testified that he saw a car parked across the street from the facility and noticed a banner hanging on the vehicle. He stated that he was not concerned about the car because he did not know if the car was there with respect to the Respondent or the business next door to it.

On February 10, 2015, the Union filed a petition seeking to represent the Respondent's warehouse employees. Thereafter, on February 26, the Respondent and the Union signed a stipulated election agreement setting March 24 as the date for the election.

#### A. Malik's Alleged Surveillance

Jose Michel Torres and Argueta testified that on February 17, as he and Argueta were working, Malik approached and said that they "were part of a union" or "with the Union." The two workers did not reply, and Malik left the area.

Argueta testified on cross examination that he was not given the impression that his union activities were under surveillance. I discount this testimony. The "impression of surveillance" is a legal term. Argueta testified credibly as to the facts which occurred.

Employee Roberto Reyes stated that, following his meetings with Fabres, Miller asked him if he "knew something about the Union." Reyes said that he knew nothing. Miller replied "I think that the one that is hanging out with the Union is Alex [Argueta]."<sup>4</sup>

#### B. The Discharges of Argueta, Jose Michel Torres and Jose Martin Torres

Manager Miller stated that in late January or early February, Tony Bindra told him that there were too many employees because the winter was harsh and "limited how much we could do." Bindra asked him to recommend who to "terminate." They

<sup>4</sup> Reyes' testimony that this conversation occurred in December is an obvious error inasmuch as the Union's campaign did not begin until January. Further, Reyes rehabilitated his testimony by stating that the remark by Miller was made after the Union appeared on the scene.



decided that Jose Martin Torres would be discharged because he was a temporary employee who replaced Juan Flores who was caring for his injured son. They also agreed to "terminate" Argueta because of his "safety problems" and to "terminate" Jose Michel Torres because he was the least productive worker.

Tony Bindra stated that he saw Jose Michel Torres asleep at work on at least three occasions, the last time being 15 to 20 days before his discharge. However, he did not wake him up because he did not speak to the workers as that was Miller's job. However, Bindra complained to Miller about Torres' sleeping on the job. No written warnings were given to Torres who denied that he received any discipline, and denied sleeping on the job.

On March 6, 1 week after the Respondent signed the election agreement, Miller told Argueta, Michel Torres, and Martin Torres that there was "not a lot of work," that work was slow, and they were being sent home but would be called back to work. However, they were not recalled.

Argueta testified that work was not light because at that time he unloaded four to five trucks and the Respondent was presenting at a trade show where customers typically place many orders for products. Sabillon testified that he did not know anyone who was laid off because work was slow. In fact, when the three employees were fired, business and work were not slow because he noticed that there was much work, citing the fact that trailers of products were received and were delivered. Jose Michel Torres also denied that work was slow at that time. He noticed that when he left work that orders were being received. Further, Henry Hernandez who continued to work after the three employees were laid off, observed that the Respondent hired one or two new workers following the layoff and after the move to Bethpage. One was a nephew of Roberto Flores.

Miller's testimony that the three employees were laid off before the Respondent learned that the Union had filed the election petition is clearly wrong. They were discharged on March 6, 2015. The petition was filed on February 10, 2015, and Tony Bindra admitted receiving it on about that date. Miller's further testimony that perhaps they were laid off before he began seeing the Union's car parked across the street from the facility is equally erroneous. The Union's car was at the Respondent's facility beginning in January, and in his speech to the workers on March 10, Miller told them that the only thing the Union can do is "stand outside." It is reasonable to find that Miller was aware of the Union's presence outside the facility at least 4 days earlier especially since the Union's car had been periodically parked across the street from the facility periodically for 2 months.

*C. Reasons for the Selection of Argueta, Jose Martin Torres and Jose Michel Torres*

*1. Argueta*

Bindra stated that Argueta crashed the forklift into a FedEx truck in the old facility in Syosset, breaking its light. According to Bindra he "always was a dangerous guy."

Argueta testified that he and other employees often climbed the warehouse shelves in order to retrieve picked orders. They were seen doing so by Tony Bindra, and did not receive any discipline for that activity. In fact, Manager Miller testified that

Argueta was "kind of reckless," on two occasions climbing the shelves instead of using a ladder. Miller warned him orally but not in writing. Tony Bindra stated that he often saw Argueta "trying to do gymnastics on the ladder."

Nevertheless, Argueta was not suspended or discharged and received no written warnings in the 4 years he worked for the Respondent.

*2. The Torres brothers*

Miller stated that Jose Michel Torres was extremely lazy - the least productive worker who tried to do as little work as possible. He was often absent from work. Nevertheless, he did not issue any written warnings to Michel and did not discipline him in the approximately 4 years he worked at the Respondent. Further, Miller accepted his recommendation to hire his brother Martin because he needed a worker at that time.

Miller testified that when Michel asked him for a job for his brother, he told Michel that there were no openings. Later, when Flores was absent to care for his son, he looked for a temporary replacement until Flores returned. However, he did not testify that he told Michel or his brother that he would be retained only until Flores returned. In fact, the Respondent's records reflect that Flores left work on December 12, 2014, to care for his son and returned on February 17, 2015.

Flores performed many tasks. He pulled orders and worked as a handyman, changing light bulbs and fixing the factory doors. In contrast, Jose Martin Torres was employed solely as an order picker.

Miller testified that he told Jose Martin Torres when he was hired that he was being hired as a "temporary employee." Miller said that he told Torres that Juan Flores was away from work caring for his child and that when he returned "we'll see how business was, and we would take it from there."

Miller's statement concerning Torres' continued work was thus equivocal. He did not definitely say, according to his own testimony, that Martin would be released when Flores returned. Miller held out the possibility that if business was good he would be retained.

Miller's testimony is flawed. The Respondent's records establish that Martin Torres was employed by the Respondent on February 17, 2015, when Flores returned to work, and that Martin was not discharged until 3 weeks later, on March 6.

*3. The alleged lack of work defense*

The Respondent asserts that the three men were laid off for lack of work. Tony Bindra stated that the weather that season was harsh, and sales were down from the previous year. He also testified that following Christmas work is slow.

First, it should be noted that the three men were discharged on March 6, more than 2 months after Christmas. Their discharge was 2 weeks after the election petition was filed and 1 week after the election agreement was signed.

I must note Tony Bindra's contradictory testimony. He first definitively testified on examination by General Counsel that the three men were "terminated . . . and were not laid off." On examination by Attorney Zabell, the following day, he stated that they were "laid off."

The Respondent produced a list of employees all of whom were marked as being "laid off" in the period 2010 to 2015.

However, Tony Bindra could not testify definitively as to who was terminated and who was laid off. He stated that when the document was prepared it was "just easier to drag this thing [the term "laid off"] from an Excel program and put it in there." Finally, when asked about the accuracy of the term "laid off" when applied to all the employees on the list, he said "I don't know if it's accurate or not. I'm just saying I don't remember this." Nevertheless, he identified two employees who were laid off in February 2015, for lack of work: Chris Chiarappa, a buyer and Michael O'Hara, a salesperson. It must be noted that no warehouse workers were laid off or discharged at that time other than the three discharges, Argueta, and the Torres brothers.

Tony Bindra stated that in response to the subpoena's demand for documents which would show the reasons for its termination that there was insufficient work to justify the employment of Argueta, Jose Martin Torres, and Jose Michel Torres, the Respondent provided just two documents, identified as General Counsel Exhibit 15 and 16. Bindra stated that the Respondent's purchase of goods were \$17,780,000 in 2015, and \$25,302,520 in 2014. He guessed that one reason was the very cold weather in 2015 and with too many warehouses in Syosset the amount of snow made it impossible to travel between its three warehouses in Syosset. In answer to a leading question from Zabell, Bindra replied that the Respondent could not make deliveries to facilities because of the snow.

Bindra stated that the numbers in General Counsel Exhibit 15 and 16 were based on data that was input in the computer which was derived from purchase orders and slips and other sources. He conceded not having produced purchase orders or purchase documents, saying that there are "thousands of documents and he did not know where they were, adding that if he printed them there would be a "million pieces of paper."

The General Counsel stated that she asked for original books and records—back-up documents and not just the summaries set forth in General Counsel Exhibit 15 and 16. Zabell replied that if back-up documents exist in the form of data in a computer he was under no obligation to compile a report that satisfied the General Counsel. General Counsel noted that the subpoena also demanded electronically maintained documents. Zabell stated that the records no longer exist, but that the "raw data . . . exists in an accounting program; "the data from purchase orders exist in a database . . . . Information does exist in the form of random data in a database that supports the financial information provided . . . . That data is not decipherable absent the created report. A summary of report existed and it was provided. Counsel now seeks to have Respondent create reports for purposes of this litigation without providing any legal basis to support imposition of such a duty. The creation of documents that do not exist from information that absent such a report is indecipherable exceeds the obligations imposed by the subpoena."

During the hearing, the General Counsel filed a Motion to Impose Sanctions under *Bannon Mills, Inc.*, 146 NLRB 611, 633-634 (1964).<sup>5</sup>

<sup>5</sup> The Motion, the Respondent's Opposition and certain other documents were received in evidence as G.C. Exhibit 25.

I granted the General Counsel's motion and the requested sanctions. I noted that Federal Rules of Evidence 1006 states that the contents of voluminous writings which cannot conveniently be examined in court may be presented in the form of a summary, but that the originals shall be made available for examination. I ruled that it was the Respondent's obligation to produce the documents. I noted that Zabell stated that the data was available, and if reports had to be created to produce the data they should have been created.

The sanctions which I granted precluded the Respondent from presenting any documentary or testimonial evidence on the subject matter relating to its defense that the three employees were laid off due to a slowdown in business, and that the Respondent was similarly precluded from producing such evidence relating to the financial status of the Respondent's business. I also granted the General Counsel's requested sanction that I draw an adverse inference that the Respondent's financial records, had they been produced, would not support its claim that a downturn in business necessitated the layoff of the three employees.

#### *D. Miller's Meeting with Employees*

Henry Hernandez testified that in March, following the visits of Fabres across the street from the shop, he was speaking to his coworkers when Miller approached and said "let's talk face to face about the Union. Don't be like a girl!" or "if you want to talk about the Union, come in front. Don't act like a girl."

Miller testified that he did not hear the employees speaking with each other concerning the Union and did not assume that their conversation related to the Union. However, his pretrial affidavit stated that he held a meeting, discussed below, with employees because he saw about four employees sitting in the corner hiding behind pallets, talking about "things." He did not know what they were speaking about but told them if they wanted to speak they should "bring it out in the open and we can talk about it."

The next day, on March 10, 4 days after the three employees were discharged and 2 weeks before the election, Miller called a meeting of all the employees, in which he said that he would speak about the Union.<sup>6</sup> Employee Sabillon recorded the meeting which was later transcribed and received in evidence. Miller, who is fluent in Spanish, told the employees, as relevant to the complaint allegations, as follows.

You are going to vote for union. This is what will happen. If [it] passes. If you vote and you want. And the union gets in. What is going to happen is. You will have to strike because we are not going to accept that. So, those who vote Yes. I am telling now that you will lose your jobs because you are going to go out there, stand outside with the union. Those who don't vote are going to be here, working and, and we will be bringing new people. So, people who don't, who vote, and go out there, I am telling you now, if you want you can go now, because you will not have a job. We will not bring the other.

<sup>6</sup> Hernandez testified that the meeting took place in the morning at 9 or 10 a.m., but his affidavit stated that it occurred after lunch, at about 11 a.m. This minor inconsistency is immaterial. There is no dispute that the meeting occurred, as supported by the recording of it.

The others are going to. You know what. The only thing the union can do is to stand outside for. I don't know how to say it in Spanish. But we will bring new people because I know that not all of you will vote. I have 100 percent that not all are going to vote. So, those who do vote, I am telling you as of now, if you want. You are not coming back in here because you will lose your job. Because we will fight this.... I feel betrayed because I always treated everyone right. Because prior to my getting here you did not take coffee break or take anything. When I got here I changed everything.... I give you a lot. How do you say that? Ah. Freedom. The phones I don't say anything. You come wearing shorts, wearing tennis, I don't say anything. Okay. If you want change, careful what you ask for. Okay. Because a lot will change. But I am telling you right now, those who vote for the union, you will lose your job. Because we will fight it until the end. And all the union can do, like I said, is to stand outside. You left for months. Even Alex when his sister died left for months. And we always took him back.... I don't understand what happened with this union thing, but now I see Alex and Victor out there with them. But I don't know what is going on. You know more than I do. Because I know you were hanging with Michel and they told you. I was not there but I am 100 percent that he....

But if you're going to start work for us or trouble for us, I don't want you here. You. I have treated you right the whole time. If you want me to treat you poorly, you shall see. Okay. But I am telling you one, one thing, those who. The union is never getting in because we will fight. You shall see if you can go some two, three weeks without pay. We will bring other people and it will hurt them for one week, two weeks, but they will learn. Just like you learned, like you learned everything. The new people will come and learn the job.... If you are not happy, leave. But stop, don't bring problems for me because I am not going to be happy and if I am not happy you will not be happy....

[At this point an unidentified employee told Miller that he [Miller], as a manager must speak for the workers. Miller replied]

Exactly. Right. I am always doing that. That is why I can get everything I have gotten for you. So you can take the break. There was no coffee break here before.... If you are not happy, leave, leave.... When you were leaving you asked me, when you called me to come back I brought you back. You wanted to bring your brother and your two brothers were brought in. When you need something you go to Tony and helps you.... I gave your brother work because of you. So, everyone it's like a family. .... This started from nothing. I don't know where this started. That is the problem. We were fine here. Someone is putting things in your head but if you want it, if you don't believe me, do what you got to do and do what you gotta do. You'll see what happens.

It should be noted that the transcript of the recorded meeting contradicts Miller's trial testimony that he did not tell the workers that (a) a vote for the Union will cause a strike (b) the Respondent would not accept the Union (c) those who voted for the Union will lose their jobs or will have to stand outside

while those who voted against it will be working (d) those who vote for the union could leave now because they would not have a job (e) the Respondent will bring in new workers for those who vote for the union and (f) those who vote for the Union will not be returning.

Rather, Miller testified flatly that the only question he recalled asking is if the workers knew how much they would have to pay in union dues.

During the meeting, Miller asked, whether in "your country" employees were paid for their work. One worker said they were paid for their work. Miller replied that they were paid because they were in that country. He added that "you have all the rights here. I know what the union is telling you. But, no they don't have good social. What are they going to do for you in the union? They cannot do." An employee answered that his wife "has no papers" and she was paid for the holiday.

Henry Hernandez testified that Miller said at the meeting that the Union could do nothing for the workers because they did not have a "good social security." Employee Roberto Reyes stated that at a meeting, Miller told the workers that if they did not have "papers, social security," the Union would do nothing for them.

Following the playing of the recording of the meeting, the Respondent amended its answer to admit that on about March 9, Miller (a) threatened employees with unspecified reprisals if they selected the Union as their collective-bargaining representative (b) told employees that it would be futile to select the Union as their collective-bargaining representative and (c) threatened employees with discharge if they selected the Union as their collective-bargaining representative.

I reaffirm my ruling that the Respondent's later claim that the tape was inaccurate has no merit. Zabell was invited to produce any evidence to support that claim. He did not do so.<sup>7</sup>

#### *E. The FLSA Lawsuit and the Events following the Election*

The election was held on March 24. Henry Hernandez and other employees stated that following the election they continued to meet with Union Agent Fabres. Their conversations included their concern that they had not been paid for the overtime hours they worked. Fabres said that he would obtain an attorney to speak with them about that issue, and later brought them to meet an attorney who filed the lawsuit.

A federal lawsuit was filed on about July 6, 2015. Tony Bindra admitted receiving the lawsuit on about July 8. The plaintiffs were listed as Jose Reyes, Jairo Bonilla, Augustin Sabillon, Javier Reyes, Selvin Vasquez, Marvin Hernandez, Henry Hernandez, Jose Olan Amador, Armando Lazo, Valerio Baquedano, Jose Michel Torres, Jose Argueta, and Noel Efrain Cas-

<sup>7</sup> Zabell first claimed that the recordings were not full and complete. He was given a copy of the recordings and transcripts thereof, which were also received in evidence. The Respondent had already amended its answer following Zabell's statement that "based upon the testimony that just came out, it appears that I'm going to have to amend my answer somewhat, to amend the pleading to comport to the testimony .... It will involve me reviewing my notes, reviewing the tape but I do believe it will streamline the process today." After a 1-hour break, Zabell amended the Respondent's answer to admit the allegations set forth above.



tro. The complaint stated the residence of each plaintiff and alleged that each employee worked on weekends and was not paid at the overtime rate for such work pursuant to the FLSA and the New York Labor Law.

Tony Bindra admitted that, upon receiving the lawsuit, he was "surprised and disappointed" and for that reason wanted to meet with the workers. He was surprised because most of the information contained therein was incorrect, including the employees' addresses and their claim that they worked on the weekends. He wanted to make certain that the suit was their own product. Bindra denied discriminating against employees because they filed the lawsuit.

Employee Roberto Reyes testified that on July 15 he was called into Miller's office where Miller and Tony Bindra spoke to him alone. Bindra showed him the court papers and asked if he knew anything about the attorney who filed the FLSA suit. Reyes denied any knowledge of the matter. Bindra challenged him, saying that his name was the first one listed. Reyes repeated that he knew nothing. Bindra told him to return to work and said that he would meet one-by-one with the workers.

Shortly thereafter, a meeting was held at which Tony Bindra spoke to the workers. His words in English were translated into Spanish by Miller. Sabillon recorded the meeting.

Bindra began the meeting by telling the workers that he was served with the lawsuit and read all the employees' names listed, asking them where they lived and comparing their responses with the information in the lawsuit. He said that "all these guys' names are here. They are all suing me." He noted that the suit alleges that he has not paid them for work performed on weekends. Bindra told the men that they never worked on weekends. He told them that "now I have to defend myself," adding "so now the question is this. We are fighting or we are not fighting? I didn't pay you or did I not pay you? That's the question."

Bindra asked the employees if they were still intent on pursuing the lawsuit. At hearing, Bindra explained that the men agreed that their statements in the suit were false, that they did not work on the weekends and that they no longer wished to pursue the suit. However, the transcript of the meeting does not support a finding that the employees admitted that their allegations in the suit were untrue.

#### *F. The Implementation of New Work Rules and Discipline Imposed*

One week after Bindra's meeting, on July 21, 2015, the Respondent implemented an employee Code of Conduct. This was the first time that the Respondent implemented written work rules of any type. It provided as follows:

##### *Employee Code of Conduct Time and Attendance Policy*

Employee lateness interferes with the company's business operations. All employees are required to report to work on time. The scheduled start time for employees is 8:00 am. Any employee who signs in later than 8:05 will be subject to discipline. Consistent with this policy, employees who report to work late will receive a disciplinary warning. If an employee persists in being late, and they accumulate 3 unexcused inci-

dents of lateness during a twelve month rolling time period, they will be subject to termination. There are no exceptions to this rule.

##### *Warehouse Personnel*

The company adheres to all laws and regulations regarding worker and workplace safety. Consistent with this practice, no employee working in the company warehouse will be permitted to utilize their personal cell and/or smart phone, or any other non-company issued electronic device. This includes the operation of such devices with headphones and/or other hands-free components. Any violation of this policy will result in the immediate imposition of discipline, up to and including termination.

Cell phone bins will be provided as a convenience for employees to store their cell phones though employees are requested to leave their cell phones at home.

Employees who utilize their cell phone during work hours will be disciplined up to and including termination.

The form had a place for the employee to sign that he acknowledged and agreed with the policies. Employees testified that they made and received cell phone calls during working hours, they used their headphones while working, and that the Respondent's supervisors saw them doing so. None of them was disciplined for such conduct. Indeed, Tony Bindra testified that the warehouse workers "always" wore headsets. He stated that he "always told them not to use the headphones but they never listen."

Tony Bindra testified that he implemented the cell phone policy because of the dangerous nature of the warehouse environment: forklift trucks moving back and forth creating noise while employees wore headphones limiting their ability to hear the trucks. His concern in implementing the time and attendance policy was that the Respondent was losing money at that time and he wanted employees to come to work on time. It must be noted that subpoenaed time records of all the employees were not produced.

It is undisputed that prior to the issuance of these rules the Respondent had not issued any written workplace rules and procedures.

Bindra stated that he began work on the new policy at about the time the Respondent moved to its new Bethpage facility in mid-June, 2015 when the first draft of the policy was created. He stated that he was served with the FLSA suit 1 month later on July 13. His intent in instituting the new rules was that he wanted the work to be performed more efficiently and safely in the new location. Further, forklift trucks were used more often in Bethpage than in Syosset because it was a bigger location with more room to maneuver the machines. In Syosset, dollies were used in the smaller warehouse aisles. Nevertheless, notwithstanding the use of forklifts in Syosset, no written rules were implemented there concerning the use of cellphones or headphones.

Respondent's witness Aldo Hernandez, a paralegal at Attorney Zabell's law firm, testified and produced documentary evidence that the new cellphone policy and the new time and attendance policy was last edited on were last edited in Zabell's office on June 18, and July 10, 2015, respectively.



On July 21, a payday, Mena, a payroll employee, told the employees that they had to sign the Employee Code of Conduct which was written in English and Spanish.

Five employees, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon refused to sign it. Mena called Miller over and he said that the employees must sign it. They refused. Tony Bindra told them that that was their last day of work. They then were given their last paycheck and they left the premises.

Thus, the Respondent terminated five long term employees solely because they refused to sign the new attendance and cell phone policy. It must be observed that the five discharges had been employed for years by the Respondent without their being disciplined for any reason. Sabillon began work in October, 2010, Roberto Reyes started work in about April, 2011, Marvin Hernandez became employed in about 2011, and Henry Hernandez and Javier Reyes began work in about March, 2014.

Tony Bindra testified that all of the Respondent's employees signed the new policy except the five discharges. Roberto Reyes and Sabillon also stated that those employees who signed the work rules retained their jobs. However, in response to the General Counsel's subpoena which demanded all the signed policies, only nine were produced notwithstanding that, according to the July 2015 payroll, at least 26 warehouse workers were employed at that time. There was no evidence that other employees who may have not signed the policy were discharged at that time. Thus, although Bindra and two employees testified that others who signed the forms retained their jobs, there was no documentary evidence, the best evidence, to support that claim.

The complaint alleges that the Respondent implemented the "new work rules and discipline regarding cell phone use and lateness and discharged the five employees because they filed the FLSA lawsuit in early July. Tony Bindra admitted receiving the lawsuit on July 13.

Miller testified that the Respondent always had a rule that cell phone use was prohibited, but it was enforced, for safety reasons, only when the facility moved from Bethpage to Syosset in late May 2015. Miller stated that from late May through July 21, when the new policy was introduced, a period of about 7 weeks, the employees worked "with these pieces of equipment running around in the warehouse . . . when they were wearing their headphones, and [I] said nothing." Miller stated that when he saw an employee using a cell phone he would "yell"—a form of warning that they should not be using their phone.

Miller testified that in March 2015, if an employee was late there was no written rule regarding any consequence for his lateness. The Respondent instituted the attendance policy because many employees were absent from work frequently. It decided to "tighten" the policy, which, according to Miller, was always in effect but not enforced. He conceded that no one was discharged for being late.

Miller testified further that prior to the move to Bethpage in late May, he told the workers that, once the facility moves, no one would be permitted to use their cell phones since the new facility would be bigger and have more machines. He explained that the rule was not implemented until July because, at first, all

the workers were "on board" with the new rule, but then "just got lax and began falling back in the old pattern again."

Tony Bindra stated that the employees were told that if they did not sign the new policy they would be fired, but if they signed they could retain their jobs. In contrast, the employees stated that they were not told that they would be discharged if they did not sign the policy.

Bindra also stated that he told all the workers to put their cell phones in a cubby which he provided and not use their headphones. They told him that they would not sign the policy because they wanted to continue to use their cell phones and headphones. They were discharged for their refusal to sign the policy.

As set forth above, Miller told the employees on March 10, 4 months before the implementation of the new rules, that he felt betrayed "because I always treated everyone right . . . I give you a lot . . . freedom. The phones I don't say anything. If you want change, careful what you ask for. Okay. Because a lot will change . . . If you are not happy, leave. But stop, don't bring problems for me because I am not going to be happy and if I am not happy you will not be happy . . . Someone is putting things in your head but if you want it, if you don't believe me, do what you got to do . . . You'll see what happens."

The employees testified that they understood that they were supposed to report to work on time and certain employees stated that they knew that they could be disciplined or discharged if they were late often. The Respondent argues that these were work rules that were in place, were understood by the workers and, accordingly, the written implementation of these rules was just a continuation of rules the workers understood and were nothing new.

*G. The Alleged Threats Made in the Hearing Room on December 9*

Union President Gilberto Mendoza stated that as he stood at the doorway to the hearing room he saw Zabell enter the hearing room and say "immigration is here" and then walked inside the room. At that time, the employees were seated in the back row of the room near the door which was open. Mendoza added that Zabell was not speaking to anyone when he made that comment. A few minutes later he then heard Zabell point to the workers and say "they are not going to get a penny from my client. This is a waste of time. They are a bunch of immigrants . . . if they get up to the stand and give a statement they will be committing perjury so I'm going to take it to the grand jury so they can be deported." He also said that he would call the Immigration Service.<sup>8</sup> Mendoza said that the witnesses were Spanish speakers but that some understood English.

General Counsel Powell told Zabell to cease making such accusations.

The employees testified as to what they heard Zabell say. Their knowledge of English is admittedly limited. However,

<sup>8</sup> Mendoza's affidavit stated that the administrative law judge was present when Zabell made these comments. I stated on the record that I was not present during this incident. Mendoza admitted that he was confused by another incident in which Zabell was yelling regarding Mendoza's presence at which I was present.

they credibly testified as to what they heard and that they understood the words Zabell uttered.

Argueta testified that he does not fully understand English but that he understands a little English. While testifying in cross-examination through an interpreter he understandably stated that he did not understand Zabell's words as they "exit [his] mouth."

Argueta first testified that he was at the elevator with employee Michel Torres when they observed Zabell arriving for the hearing. He heard Zabell speaking to his clients concerning "immigration," and remarking that he was going to "report us to Immigration." Argueta then testified that later, when he was in the hearing room with his coworkers, he heard Zabell say that he would report them to Immigration and that he was not going to pay the workers "not even a penny." He heard Powell tell Zabell three times to "stop."

It must be noted that Argueta made two errors in his testimony. He testified that he heard Zabell's comments in hearing room number 2 during which time the administrative law judge was present. In fact, the alleged comments were made in a different hearing room where I was not present when Zabell allegedly made the comments testified to. These errors do not undermine his testimony, the most important aspect of which was the comments made by Zabell. Those comments were corroborated by other employee witnesses and I credit them.

Javier Reyes testified that Zabell pointed to the workers. Although Reyes gave his testimony through a Spanish interpreter, he stated, in English, that "he report with immigration," and the workers would not get a penny. He stated that he is able to read and understand 35 percent of what is written and spoken in English.

Roberto Reyes stated that he did not understand what Zabell said but understood that Powell told him three times to stop. He testified that no one translated what Zabell said, but he believed, at that time, based on Zabell's pointing to him that he "was calling me a criminal."

Henry Hernandez, despite that he testified through a Spanish interpreter, testified in English as to what he heard. He stated, in English, that "report to immigration and like penny or something." He credibly and honestly stated that he does not understand much but he understands a little English. He testified that on December 9, Zabell pointed to all the employees sitting in the rear of the hearing room, and screamed at them, saying that he would report them to "immigration" and that the Respondent was not going to pay a penny. General Counsel Powell told him several times to stop. Prior to that time, Zabell was speaking to Powell.

Fabres testified that on December 9, he and the employees were sitting on a bench in the rear of hearing room number 3. Before the hearing began, he saw Zabell speaking to General Counsel Cabrera in the hallway outside the hearing room. The door to the hearing room was open and is nearby the bench they sat on. Fabres testified that he heard Zabell raise his voice, yelling, commenting that "they are all illegal undocumented." He said that he was going to call the Immigration Service and have them deported. Cabrera asked Zabell if he wanted to make those comments on the record. The employees looked at Fabres and asked what was happening. Fabres told them to be calm,

telling them that Zabell made a comment about the Immigration Service.

Fabres testified that later, as he sat in the rear of courtroom 3 with the employees, he observed General Counsel Powell approach Zabell who was seated at counsel's table in the front of the room. Fabres could not hear their conversation since they spoke quietly, but then Zabell raised his voice, shouting that if the employees testified they would be committing perjury, and he would report them to the Immigration Service. Zabell also mentioned a Supreme Court case and pointed at the workers, saying that they would "not receive a penny." Fabres heard Powell telling Zabell in a loud voice to "stop, stop, stop."<sup>9</sup>

Danny Bindra testified that as he and Zabell exited the elevator at the hearing-room floor and walking down the hallway toward the hearing room he asked Zabell whether the immigration status of the warehouse employees had an effect on this case. Zabell replied that if they were "illegal" they can be deported but it is very unlikely that that would occur because the "government doesn't do it." Bindra denied hearing Zabell say that "immigration is here."

Bindra also testified that, prior to the opening of the hearing, he overheard General Counsel Powell and Zabell speak about the case. Zabell, speaking in a conversational voice, but not yelling or speaking loudly, mentioned the name of a case to Powell, adding that pursuant to that decision if the employees were undocumented they "can't get a penny out of it." He did not observe that Powell was upset at Zabell's mention of their allegedly illegal status. Bindra conceded that some of the employees were at the benches in the rear of the hearing room.

Bindra noted that at that time, Zabell said that if the witnesses give false testimony under the penalty of perjury, such perjured testimony could affect their legal status if they apply for citizenship. Zabell said that they would be giving false testimony because he had a sworn statement from them. Bindra denied hearing Zabell say that he would have the employees arrested or that he would go to a grand jury and report them, and denied mentioning immigration.

#### Analysis and Discussion

##### Credibility Findings

I credit the testimony of the General Counsel's employee witnesses. Their testimony about conversations with the Respondent's representatives were mutually corroborative. They testified in a forthright, believable manner. Although their primary language was Spanish and they testified through an interpreter, they did understand, to some degree, spoken English. Indeed, they testified in English concerning certain statements they heard in English.

I discount their testimony concerning legal terms asked by Zabell such as whether the Respondent told them that it would be futile to seek union representation. Such improper questions, particularly since the Respondent had already admitted such an allegation, was beyond their limited comprehension of

<sup>9</sup> Fabres' pretrial affidavit stated that those conversations occurred on December 16. At hearing, Fabres testified that that date was inaccurate due to a mistake. The mistake is immaterial and does not undermine his testimony which is supported by employee witnesses, that the conversations occurred on December 9.

those terms. Further, minor errors in their testimony or in their pretrial affidavits or recollection in which of two hearing rooms Zabell threatened them do not impair their testimony in any way.

I cannot find that the Respondent's witnesses gave truthful testimony in important areas of their recitations. Thus, Miller denied material parts of his March 10 meeting with the workers when the recording of that meeting clearly showed that he made those statements. That recording, and the Respondent's implicit acknowledgement that Miller was untruthful in denying the statements he made, led the Respondent to change its answer to admit that his threats and statements, preserved in the recording, were made.

Further, Miller first stated that he could not hear what occurred during the election confrontation but then, upon recall by Zabell, his memory improved to the extent that he heard the precise words uttered.

Tony Bindra's testimony was extremely evasive and not believable. He first stated that he did not own Deep Distributors but then admitted that he owned that corporation. He first stated that he did not work for Deep Distributors but later stated that he did. Incredibly, Tony Bindra could not admit that his brother Danny owned Deep Distributors. When asked whether he had any independent knowledge concerning whether Danny owns Deep Distributors, he incredulously answered "I don't know what you mean knowledge, you know. How would I get the knowledge? I don't know."

When asked whether the Respondent has contracts, Tony Bindra, the owner, general manager and "overseer of everything in the company" incredibly testified "what is a contract. I don't know what you mean by a contract . . . I don't understand what contract means. Contract for me is buying a house." Nevertheless, he admitted signing contracts for the purchase of forklift machines, and with UPS for the shipping and delivery of its products, and further conceded that he and Danny are responsible for signing all the Respondent's contracts.

He first testified that Malik signed purchase orders but then said that he did not. He first testified that the five employees were discharged but later stated, in questioning by Zabell following a day's break, that they were laid off and not discharged.

Danny Bindra testified that although he was present in the hearing room during Zabell's threats to employees, he did not hear General Counsel Powell's entreaties to Zabell to cease his comments. Employees gave credited testimony that they were present in the hearing room at the same time and heard Powell warn Zabell to stop.

#### Malik's Supervisory Status and the Impression of Surveillance

The complaint alleges that employees' were given the impression that their union activities were under surveillance by the Respondent's supervisor Malik.

The complaint alleges that Malik is the Respondent's supervisor and agent. Section 2(11) of the Act defines a statutory supervisor as any individual having the authority, as relevant here, to discharge, or discipline employees, or responsibly to direct them.

The exercise of any of the above responsibilities is sufficient to vest any person with the status of a statutory supervisor. As set forth above, Malik is Miller's "main helper." Jose Torres credibly testified that when he began work, Tony Bindra told him that Malik was his supervisor, and that he and Argueta testified that Malik gave them daily assignments. He also approved their requests for leave. There was also testimony that when Warehouse Manager Miller was absent, Malik was in charge of the facility.

Although Miller testified that no employee reports to Malik, the evidence is clear that the Respondent's large facility and large number of products are divided into two areas: beauty supplies and housewares and appliances. There was credible evidence that Miller and Malik are each in charge of the approximately six employees in those separate areas.

Inasmuch as there is much work to perform in each area, it is entirely reasonable that Miller and Malik each exercise the power to assign employees to work in his own area. Thus, employees credibly testified that Malik assigns them work to do, picking orders and receiving items in the beauty supplies area. It appears that Miller exercises his own duties in the housewares and appliance area. Accordingly, I find that Malik has the authority, which he has exercised, of responsibly directing employees in their work. *Marquette Transportation/Bluegrass Marine*, 346 NLRB 543, 552 (2006).

In addition, two employees, Jose Torres and Argueta, credibly testified that they were told by two other employees that they had just been discharged by Malik. The two discharges did not return to work thereafter. Further, Argueta stated that he received an oral warning from Malik who warned him that he would not receive any more chances if he made another mistake.

Moreover, Malik occupies a position of trust. He is the only employee who has access to the blade room where the most expensive merchandise is stored. He also prints the work orders.

Inasmuch as Malik did not testify no evidence was received from the person at issue. Nevertheless, it is the burden of the party claiming that the person is a statutory supervisor, the General Counsel, to prove that he possesses such status.

I find that General Counsels have met their burden. The evidence is clear that Malik is a statutory supervisor. If it is ultimately decided that Malik is not a statutory supervisor, I find that he is an agent of the Respondent. Malik was placed in a position of trust having access to a room containing expensive merchandise in which no other employee was permitted to enter. Inasmuch as he worked with employees who he assigned work to, it is clear that they would have reason to believe that he spoke and acted for management.

"The Board's test for determining whether an employer has created an impression of surveillance is whether the employee[s] would reasonably assume from the statement in question that [their] union activities had been placed under surveillance." *Grouse Mountain Lodge*, 333 NLRB 1322, 1322 (2001). The Board further stated that "employees should be free to participate in union organizing campaigns without the fear that members of management are "peering over their shoulders, taking



note of who is involved in union activities, and in what particular ways." 333 NLRB at 1323.

I credit the testimony of Jose Michel Torres and Argueta who stated that on February 17, Malik told them that they were "part of a union" or "with the Union." Torres and Argueta had not made their union support known to the Respondent. Their activities consisted of meeting with union agents. Malik's comments made them reasonably assume that their union activities were kept under surveillance and therefore violated Section 8(a)(1) of the Act.

#### The Discharges of Argueta, Jose Martin Torres and Jose Michel Torres

The complaint alleges that on March 6, 2015, the Respondent discharged Jose Wilfredo Argueta, Jose Martin Torres, and Jose Michel Torres because they joined and assisted the Union and engaged in concerted activities. The Respondent argues that they were laid off for lack of work, and were selected because of their misconduct.

#### The General Counsel's Prima Facie Case

Pursuant to the Board's decision in *Wright Line*, 251 NLRB 1083 (1980) in cases alleging a violation of Section 8(a)(3) and (1), where motivation is at issue, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. The General Counsel may meet this burden by showing that (a) the employee engaged in union or other protected activity (b) the employer knew of such activity, and (c) the employer harbored animosity towards the union or other protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184-1185 (2011); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. *Brink's, Inc.*, 360 NLRB 1206, 1206 at fn. 3 (2014). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorain*, above.

Jose Michel Torres and Argueta gave credible testimony that they attended union meetings and that they greeted Union Agent Fabres at his car in front of the facility. There could be no doubt as to Fabres' purpose since his car bore a large sign with the name of the Union. In fact, Miller said that he did not know whether the car was there for the Respondent or the business next door. Clearly, Miller possessed knowledge, or at least a suspicion, that the Union was present on behalf of the Respondent's employees.

I also find that the Respondent possessed knowledge of the union activities of the three men. As set forth above, I have found that Malik told Jose Michel Torres and Argueta that they were "part of a union" or "with the Union." Malik did not testify and therefore their testimony is un rebutted.

I credit the testimony of Roberto Reyes who stated that Miller asked him if he "knew something about the union." Reyes denied knowing anything about the Union. Miller replied "I think that the one that is hanging out with the Union is Alex [Argueta]." Miller did not deny this remark attributed to him, and therefore it stands un rebutted.

There was no direct evidence that the Respondent knew that Jose Martin Torres engaged in union activities or that the Respondent was aware of them. However, the General Counsel argues that he was discharged because he was the brother of Jose Michel Torres who had recommended him for hire.

The Board has held that the discharge of a person in order to retaliate against his relative who was a union activist is unlawful. *Thorgren Tool & Molding*, 312 NLRB 628, 631 (1993); *Carrizo Mfg. Co.*, 214 NLRB 171, 181 (1974). Here, I find that the General Counsels have met their burden of proving that the union activities of Jose Michel Torres was a motivating factor in the Respondent's decision to discharge his brother Jose Martin Torres. *T.M.I.*, 306 NLRB 499, 503 (1992).

Thus, I find that, as in *T.M.I.*, the timing of the discharges of the three men, coming only 4 days before Miller's strongly antiunion message to the remaining workers, including admitted threats of discharge, and only 2 weeks after Argueta and Jose Michel Torres were identified by Malik as being "part of the Union," supports a finding, which I make, that the three men were discharged because of their union activity.

I further find that the Respondent harbored animosity toward the Union and the union activities of the discharges. Miller's strongly antiunion comments to all the employees only 4 days after their discharges forcefully conveyed the message that union supporters would lose their jobs. It also confirmed to the workers that he had been "betrayed" by their interest in the Union.

Miller specifically referred to Argueta as being "out there with them" and mentioned that "because I know that you were hanging with Michel."

In addition, the Respondent's creation of the impression of surveillance, found above, which occurred before the three employees were discharged, establishes that it had animus toward their union activities. *DPI New England*, 354 NLRB 849, 868 (2009); *Diversified Chemicals Corp.*, 231 NLRB 982, 993 (1977).

Further, I cannot find, as set forth below, that the Respondent has met its burden of proving that it possessed a reasonable basis for discharging the three men for their misconduct or that it has established its economic defense of lack of work. *T.M.I.*, 306 NLRB at 504-505.

I accordingly find that the General Counsel has proven that the union activities of Argueta and Jose Michel Torres were motivating factors in their discharge. I also find that Jose Martin Torres was discharged because he was the relative of Jose Michel Torres in retaliation for the union activities of Jose Michel Torres. *Wright Line, Inc.*, above.

The burden now shifts to the Respondent to prove that it would have discharged the three men even in the absence of their union activity. *Wright Line*, above.

#### The Respondent's Defense

##### Lack of Work

The Respondent argues that the three men were discharged for lack of work. It further asserts that it chose them because of their poor work or misconduct. Neither defense has merit.

The General Counsel subpoenaed detailed financial records from the Respondent which would prove or disprove its eco-

nomie defense. As set forth above, only two limited documents which summarized certain sales or purchase orders was produced.

As set forth above, Tony Bindra gave inconsistent and contradictory testimony as to whether the three employees were laid off or discharged. The Respondent failed to provide original books and records to support the figures in the two summaries it produced. Those "back-up" documents were available in the form of data located in the Respondent's computer which Zabell maintained he was under no obligation to produce because it must be organized into a report. However, the General Counsel's subpoena called for the production of electronically maintained documents. As noted above I granted the General Counsel's motion for sanctions under *Bannon Mills*, precluding the Respondent from producing evidence in support of its lack of work defense.

Even aside from the documents, Bindra's testimony that the Respondent's work slows after Christmas is undermined by the fact that the discharges occurred more than 2 months after Christmas, and by the fact that employees testified that at the time of the discharges they were busy at work.

#### The Selection of the Three Employees

##### Argueta and Jose Michel Torres

The Respondent selected Argueta for discharge because he was "dangerous"—climbing shelves and not using a ladder. Michel Torres was chosen because he allegedly slept while at work and was lazy.

Argueta admitted crashing his forklift truck into a FedEx truck breaking its light and also conceded that he climbed the shelves, being seen by Tony Bindra and Miller. No discipline was issued for these infractions but Argueta admitted being warned by Malik for ignoring an order.

Incredibly, Tony Bindra testified that he saw Michel Torres asleep at work at least 3 times, the last being 2 to 3 weeks before he was discharged. However, Bindra did not wake him up and no discipline was given to him for this gross misconduct.

I find that the Respondent condoned the alleged misconduct of Argueta and Jose Michel Torres until an opportunity arose to discharge them for their union activities. The evidence is clear that the Respondent would have continued them in its employ, as it had for the 4 years each had been working for it, had it not been for the Union's appearance on the scene.

##### Jose Martin Torres

Miller's testimony that Jose Martin Torres was hired only as a replacement for Juan Flores lacks merit. The Respondent's records establish that Martin continued to work for 3 weeks, from February 17, 2015, when Flores returned, until his discharge on March 6. This completely undermines Miller's testimony that Martin was scheduled to be discharged upon Flores' return to work.

Moreover, Miller did not testify that he told Michel or his brother that he would be retained only until Flores returned. Significantly Miller's testimony that he told Torres that Juan Flores was away from work caring for his child and that when he returned "we'll see how business was, and we would take it from there" held out the possibility that if business was good he

would be retained. This was not an unequivocal declaration to Martin that he would be replaced upon Flores' return to work.

Further, the evidence also establishes that Flores worked as a handyman in addition to picking orders. Accordingly, Martin Torres may have replaced Flores regarding his order picking work but did not substitute for his repair work. Accordingly, they did different types of work and it appears that Martin Torres could have been retained to perform the type of work he did even upon Flores' return to work.

The reason given for Martin's discharge, that he was hired only as a replacement for Flores until his return to work was false. The evidence establishes that Martin continued to be employed for 3 weeks after Flores' return. He was discharged only when the opportunity arose to discharge him for the union activities of his brother.

#### CONCLUSION

I accordingly find and conclude that the Respondent has not proven that it would have discharged Jose Wilfredo Argueta, Jose Martin Torres, or Jose Michael Torres even in the absence of their union activities. *Wright Line, Inc.*, above.

#### Employees were Threatened with Unspecified Reprisals and Discharge; Futility of Selecting the Union

The complaint alleges that the Respondent, by Miller, threatened employees with unspecified reprisals if they selected the Union as their representative; told employees that it would be futile to select the Union as their collective-bargaining representative, and threatened employees with discharge if they selected the Union as their representative.

Miller denied making these statements. As set forth above, following the playing of the recorded meeting at which he spoke on March 10, set forth above, Miller admitted that it was his voice making these statements. The Respondent then amended its answer to admit the complaint allegations that on March 10, the Respondent, by Miller threatened employees with unspecified reprisals, told employees that it would be futile to select the Union, and threatened employees with discharge if they selected the Union as their collective-bargaining representative.

I accordingly find that these admitted threats violated Section 8(a)(1) of the Act.

#### Interrogation of Employees and Threats of Unspecified Reprisals Concerning Employees' Involvement with the FLSA Suit

On July 8, 2015, Tony Bindra received a federal lawsuit filed by the Respondent's employees including Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes and Augustin Sabillon. The suit alleged that the Respondent violated the FLSA by not paying, inter alia, overtime wages and other payments required by law.

The complaint alleges that in July 2015, by Tony Bindra, interrogated employees about their involvement in a FLSA lawsuit and threatened them with unspecified reprisals because of their involvement in the filing of a FLSA lawsuit.

The Board has long held that the filing of a lawsuit by a group of employees is protected activity. See *D. R. Horton*, 357

NLRB 2277, 2278 at fn. 4 (2012), and cases cited therein; *200 E. 81st Rest. Corp.*, 362 NLRB No. 152 (2015)

#### The Interrogation of Reyes

As set forth above, on July 15, Miller and Tony Bindra called Reyes into an office where they spoke to him alone. Bindra showed him the FLSA lawsuit and asked him if he knew anything about the attorney who filed the FLSA suit. Bindra pressed him, saying that his name is the first one listed. Reyes repeated that he knew nothing. He was told to return to work.

Following that private meeting, Bindra spoke at a meeting with employees regarding the suit, as set forth above. In that conversation, Bindra challenged them, asking them if the information concerning their residences listed in the suit was correct. He accused the men of suing him. He contradicted the suit's allegations that the men worked on weekends, asking detailed questions about when they worked. He then asked the workers if they still intended to pursue the suit, ending the conversation with the remark that "now the question is this. We are fighting or we are not fighting? I didn't pay you or did I not pay you? That's the question."

The Respondent defends the General Counsel's allegations by asserting that the employees agreed that the suit was without merit and that they wanted to abandon it. The recorded transcription contains no such statements.

In this respect I reject the Respondent's argument that a letter dated January 3, 2016, from the attorney who filed the lawsuit proves that the allegations made therein are false. The letter requested Zabell's consent to file an amended complaint, stating that the factual allegations concerning the employees' hours worked and lunchbreaks in the complaint were not accurate. He sought to delete the allegations concerning the lunchbreaks and to present a more accurate representation of the hours worked by each employee. Thus, at most, the letter represents that certain allegations contained in the lawsuit were inaccurate, not the entire lawsuit. Further, the letter states that the attorney simply wished to change the employees' hours worked, not to delete that part of the lawsuit.

Accordingly, the Respondent's argument that the FLSA lawsuit was filed in "bad faith" and therefore permitted Zabell to question the employees as to their basis for filing the suit has no merit. The fact that the Respondent unlawfully questioned the employees about their lawsuit constitutes unlawful interrogation. *Samsung Electronics, LLC*, 363 NLRB No. 105, slip op. at 1 (2016).

The Respondent also correctly asserts that Bindra said that he had to "defend myself" and that he would have to "fight." I find nothing improper with Bindra's remark that he had to defend himself." However his question whether he and the workers are fighting or not fighting constitutes coercive interrogation. He sought an immediate answer from the workers, without the aid of their attorney, as to whether the Respondent paid them properly or did not. And with that answer he posed a further question of whether they would fight each other or not.

Thus, Bindra sought to coercively convince the workers that they had been paid and therefore should not fight him in their lawsuit for proper compensation.

The remarks by Bindra constitute interrogation of the em-

ployees he addressed. The Board has held that an interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. Relevant factors include whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. The Board has viewed the fact that the questioner is a high level supervisor as one factor supporting a conclusion that the questioning was coercive. *Brighton Retail, Inc.*, 354 NLRB 441, 448 (2009). *Samsung*, above.

Here, Bindra, the manager of the Respondent and the brother of its owner, questioned its employees immediately after receiving the lawsuit. He stated that he was surprised and "disappointed" that the suit was filed. The fact that he was disappointed clearly establishes that he blamed the employees for suing him and bore animus toward them for engaging in the protected activity of filing the action. He further sought to encourage, if not coerce them, into dropping the lawsuit, asking if they still intended to pursue it.

Thus, no assurances were given concerning the questioning, the interrogation took place in an atmosphere of interference with the union activities of the workers—the Respondent admitted that it had, on March 10, threatened employees with reprisals and discharge if they selected the Union, and told them that it would be futile to do so. Further, it had discharged three employees for their union activities, and only 1 week later it unlawfully discharged five more employees for their union activities.

It is clear that Bindra and Miller sought to obtain information about the lawsuit from Reyes, asking him if he knew anything about the lawyer who filed the suit. Reyes denied such knowledge and Bindra coercively continued the questioning by noting that Reyes' name was the first in the list of plaintiffs. The Respondent's effort to obtain information about the lawsuit is unquestionably interrogation. *Samsung*, above. In the meeting with the other employees, Bindra attempted to coercively persuade the workers to abandon their lawsuit, and tried to have them discontinue their protected activity of joining together to seek to remedy their allegedly unlawful working conditions. He threatened that he would "fight" them if they continued to engage in the protected activity of pursuing their lawsuit.

I accordingly find and conclude, as alleged, that the Respondent interrogated employees about their involvement in the FLSA lawsuit and threatened them with unspecified reprisals because of their involvement in the filing of that lawsuit.

#### The Implementation of New Work Rules and Discipline

The complaint alleges that the Respondent unlawfully implemented new work rules and discipline regarding cell phone use and lateness.

As set forth above, on July 21, the Respondent implemented new work rules prohibiting cell phone use during work hours and providing discipline for employee lateness.

It is undisputed that this was the first time that written work rules have been imposed on employees. Employee testimony that they understood that they were required to report to work



on time or they would be subject to discipline misses the point. First, employees testified that they called their manager to report their lateness and no discipline was issued. Secondly, Argueta's testimony that he was asked to wear a protective belt while using the forklift was not a written rule.

The evidence strongly suggests, and I find, that the rules were implemented in response to the employees' union and protected, concerted activity. Thus, the rules were placed in force on July 21, 2015, only 2 weeks after Bindra received the FLSA lawsuit and coercively interrogated employees about its contents. Moreover, they were implemented in the context of Miller's strongly antiunion speech to employees, and the Respondent's admitted threats to the workers. Further, the Respondent discharged five of the plaintiffs named in that lawsuit for refusing to sign the new policy.

Moreover, the rules were implemented within the context of the Respondent's commission of violations of the Act in Miller's admitted threats that employees would be discharged if they selected the Union, and that it would be futile to so designate the Union.

#### The Respondent's Defense

The Respondent argues first, that it began work on the new policy before it received notice that the FLSA suit had been brought. Its witness Aldo Hernandez testified that he edited the policy in mid-June. That may be the case, but the allegation and the violation is that the new policy was *implemented* on July 21. There is no allegation as to the policy's promulgation.

The Respondent asserts that the new rules were implemented in anticipation of its move to a new facility in Bethpage, a larger facility with more forklift machines in an effort to promote safety. However, the evidence establishes that the forklift machines were also used in the former, Syosset facility. It is clear that the new safety rules would apply equally to both facilities. Nevertheless, the new rules were not implemented at the Syosset warehouse.

The Respondent argues that the new rules were an effort to improve safety. Nevertheless, the move took place in late May and the new policy was not implemented for another 7 weeks. Miller's testimony that he told the workers that new rules prohibiting cell phones would be in effect when the faculty moved cannot be believed. He noted that during those 7 weeks employees worked with dangerous equipment wearing their headphones and he "said nothing."

Miller's further testimony that employees immediately after the move were "on board" with the new policy but then "got lax" is similarly unbelievable. Clearly, no effort to enforce any policy, oral or written, was made until the employees began their activities in behalf of the Union and filed the FLSA lawsuit. It is clear that if safety was so important to the Respondent it would have implemented its new work rules when it said it would—when it moved to Bethpage.

Further, there was substantial evidence that the conduct of employees in using cell phones and wearing headphones during work hours was condoned at both locations. Tony Bindra stated that the employees "always" wore headphones and that he always told them not to do so but they did not heed his warning.

Miller precisely explained the Respondent's true motive for

implementing the new rules. In his speech to the employees on March 10, he told them he felt betrayed "because I always treated everyone right . . . I give you a lot . . . freedom. The phones I don't say anything. If you want change, careful what you ask for. Okay. Because a lot will change . . . If you are not happy, leave. But stop, don't bring problems for me because I am not going to be happy and if I am not happy you will not be happy . . . Someone is putting things in your head but if you want it, if you don't believe me, do what you got to do . . . You'll see what happens." Miller's promise to change was realized in the unlawful implementation of the new rules.

At the time of Miller's meeting with the workers, the Respondent was located in its former facility in Syosset. It is clear that Miller acknowledged that the employees' cell phone use was not appropriate but he said nothing about it, thereby condoning their use. He clearly related a change in that policy to the advent of the Union. The evidence also establishes that the new rules were put in place in reaction to the recent filing of the FLSA suit.

I accordingly find and conclude that the new work rules were implemented in retaliation for the employees' union activities and because they filed the FLSA lawsuit. *CDR Mfg.*, 324 NLRB 786, 790 (1997). I further find that the Respondent has not met its burden of proving that it would have implemented the new rules even in the absence of the employees' union and concerted activities. *Wright Line*, above.

The Discharges of Henry Hernandez, Marvin Hernandez  
Roberto Reyes, Javier Reyes, and Augustin Sabillon

I have found, above, that the implementation of the new work rules was unlawful. It is well settled that discharge of employees because they violated an unlawful rule is itself violative of the Act. *Tuscaloosa Quality Foods*, 318 NLRB 405, 411 (1995), and cases cited therein.

In addition, under a *Wright Line* analysis, I find that the five employees who were discharged were all engaged in union activities, and all were named plaintiffs in the FLSA lawsuit which was well known to the Respondent at the time they were discharged. The Respondent's animus toward the employees for filing the lawsuit is established in the coercive interrogation and threats made at the July 15 meeting and in the context of the Respondent's admitted unlawful threats made at Miller's meeting. I therefore find that the General Counsel has established a *prima facie* showing that their activities were a motivating factor in their discharge.

The Respondent argues that it discharged the five workers because they refused to sign the new work rule policy. It claims that all its employees signed the policy but, as set forth above, it could produce only nine signed forms from the approximately 26 workers employed at the time. There was no evidence that employees who had not signed the form were also discharged.

In addition, the employees testified that they understood that they were supposed to report to work on time and certain employees stated that they knew that they could be disciplined or discharged if they were late often. The Respondent argues that these were work rules that were in place, were understood by the workers and, accordingly, the written implementation of these rules was just a continuation of rules the workers under-

stood and therefore were nothing new. It must be emphasized that there were no written rules of any kind in existence until the implementation of this work rule policy, and that the Respondent tolerated for years the type of conduct prohibited by the new rules.

The Respondent also claims that these rules promoting safety in the workplace were themselves, proper rules. That may be true but, as found above, they were unlawfully implemented for unlawful reasons to retaliate against workers.

Nor did the Respondent establish why it had to discharge long-term employees with no record of discipline. It did not consider giving them a written warning or some lesser form of discipline. The fact that it had tolerated the identical conduct suddenly prohibited pursuant to the new rules undermines the Respondent's argument that it was vital that the rules be adhered to immediately.

I accordingly find and conclude that the Respondent has not met its burden of proving that the five employees would have been discharged even in the absence of their activities in behalf of the Union and in participating in the FLSA lawsuit against the Respondent. *Wright Line*, above.

#### Threats of Legal Action in a Board Hearing Room

The complaint alleges that on about December 9, Respondent, by its attorney Saul D. Zabell, while in a Board hearing room (a) threatened employees with legal action in retaliation for engaging participating in a Board hearing and because of their union activity and (b) threatened to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

As set forth above, the Union's witnesses credibly testified, in a mutually corroborative matter to essentially the same facts. Attorney Zabell told the employees that he would report them to the immigration authorities and that they would "not get a penny." He made these statements while the employees were in the hearing room.

Danny Bindra conceded that he heard Zabell tell Powell that if the employees were "illegal," they could not receive a penny due to a case whose name he could not recall. Thus, Bindra admitted that employees were in the room when Zabell made those comments—essentially corroborating the General Counsel's witnesses on that point. It must be noted that Zabell did not testify to refute these allegations.

I thus reject the Respondent's argument that Zabell was simply speaking to his client at the elevator concerning the effect of the employees' immigration status on this case. The evidence is clear, as admitted by Bindra, that he heard a conversation concerning immigration between Zabell and Powell in the hearing room.

[T]hreats to employees that election of the union might result in their being reported to Immigration officials and, presumably, possibly deported, may similarly elicit strong fears in the employees. While the record contains no evidence that any of respondent's employees are illegal aliens, should any of them fall within that category, then Allard's threats would undoubtedly evoke the most intense fear, not only of employment loss, but of removal from their very homes as well. Like the fears of job loss discussed above, fears of possible trouble

with the Immigration Service or even of deportation must remain indelibly etched in the minds of any who would be affected by such actions on Respondent's part. *Viracon, Inc.*, 256 NLRB 245, 247 (1981).

Here, although there was no effective threat of job loss since the employees had already unlawfully been discharged, nevertheless there were threats by the Respondent through Zabell that he would report them to the Immigration Service and that they would not receive a penny through this proceeding.

I accordingly find and conclude that the Respondent, by Zabell, threatened employees with legal action in retaliation for engaging participating in a Board hearing and because of their union activity and threatened to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

There is no question that employees have an unfettered right to participate in Board proceedings free of threats and intimidating comments by a respondent. The threats were of such a nature that they had a tendency to interfere with the employees' uninhibited right to freely appear at the Board hearing and give testimony.

Threats in a hearing room made to employees therein that an immigration investigation would be requested have been found to be unlawful threats in violation of Section 8(a)(1) of the Act. *AM Property Holding Corp.*, 350 NLRB 998, 1042-1043 (2007), and cases cited therein.

#### The Election

The election was held on March 24, 2015. Nine valid ballots were cast for the Union and five ballots were cast against the Union. Five ballots were challenged. The ballots cast by Jose Wilfredo Argueta, Jose Martin Torres, and Jose Michael Torres, the alleged discriminatees in the unfair labor practice case, were challenged by the Employer. The ballots cast by Amjad Malik and Manjit Singh were challenged by the Union. The Regional Director directed that the hearing concerning all five challenged ballots be consolidated with the unfair labor practice proceeding. The Employer filed Objections to the election which was also consolidated with this proceeding.

#### The Challenged Ballots

Inasmuch as I have found, above, that Jose Wilfredo Argueta, Jose Martin Torres, and Jose Michael Torres were unlawfully discharged, they remained statutory employees at the time of the election. I therefore direct that their ballots be opened and counted.

Inasmuch as I have found that Amjad Malik was a statutory supervisor and agent, I therefore find that his ballot should not be opened and counted.

Manjit Singh did not testify. The burden is on the challenging party, the Union, to prove that the voter who was challenged is ineligible to vote. Tony Bindra testified that Singh was a warehouse employee and driver who performed the same work as Argueta, Jose Martin Torres, and Jose Michel Torres. There was no evidence presented to rebut that testimony. I therefore find that Singh was a member of the unit and eligible to vote. I accordingly direct that the ballot of Manjit Singh should be opened and counted.



### The Objections

The Respondent filed the following objections to the election:

Prior to the election, and during the course of voting, the Union pressured Imperial's employees to vote in favor of the union. The Union leveraged threats concerning employee's immigration status, along with promises regarding legalizing their immigration situation, to secure favorable votes. Moreover, during the course of the election, the Union, in an apparent effort to bully their way to a desired election outcome, resorted to acts of physical violence against Imperial's agents.

The aforementioned acts have a corrosive effect on the sanctity of a fair election. As such, the NLRB should decline to certify the March 24, 2015 election and should commence an investigation into the improper and unlawful conduct that transpired.

The Regional Director directed that a hearing be held on the allegations "that the Union would call immigration authorities and have employees deported, the promise that a vote for the Union meant employees could stay in the country lawfully, and the intertwined threat by employees that various members would kill an employee if s/he voted against the union because it would mean that they would be deported (which grew from the initial threat by the Union)."

The Director also directed that a hearing be held on the "allegation that a Union representative verbally and physically accosted the Employer's representative in front of employees at the beginning of the election."

The Director did not direct that a hearing be held on the allegation that a union agent engaged in unspecified threats, intimidation and electioneering immediately prior to and at the election.

#### The Alleged Threats Regarding Employees' Immigration Status

Tony Bindra stated that sometime prior to the election, one employee told him that he was told by the Union that if he did not vote for it, his immigration status would be affected, and he would be deported. Bindra did not identify the union agent and did not know the alleged victim's name. Bindra also stated that the same employee told him that he was told that a vote for the Union meant that he could remain in the United States legally, and that he would be given a green card.

Manager Miller testified that no employee told him that he was threatened by the Union or that the Union had mentioned anything to the workers about their immigration status.

Union President Mendoza and Union Agent Fabres denied speaking to the employees regarding their immigration status. No threats or promises were made regarding their immigration status, and no union agents told the employees that they would be deported if they did not vote for the Union.

Henry Hernandez denied having any conversations with union agents or employees concerning their immigration status in relation to their vote in the election. Nor did he recall discussions in which an employee's life was threatened concerning their vote. Jose Michel Torres denied that anyone made any promises to him regarding his immigration status if he voted for the Union.

Employee Marvin Hernandez stated that no union agents made any statements to him concerning his immigration status if he voted for the Union. Similarly, Sabillon testified that no union agent promised him anything regarding his immigration status at the time of the election.

Javier Reyes denied that any union agent made any promises to him concerning his immigration status regarding his vote at the election. No one threatened him with deportation for exercising his rights to join a union.

Roberto Reyes stated that no union agent told him that how he voted may affect his ability to stay in the United States. Argueta denied being spoken to by anyone concerning his immigration status and its effect on his vote.

Inasmuch as no evidence was presented in support of this Objection it is overruled.

#### The Alleged Acts of Verbal and Physical Violence Toward the Respondent's Agents

As set forth above, the election agreement provided that the election would take place in the warehouse area adjacent to Miller's office by the large west facing loading door at the Employer's facility, and that stated that the Employer agreed to turn off all surveillance cameras for the period of the election, which record the warehouse area adjacent to Herb Miller's office in addition to all exits in and out of the area. The controls for the video surveillance system are located in the "blade room" which is near the election polling location.

Tony Bindra testified that there was no agreement to shut the cameras during the election, but nevertheless he was told by Zabell to turn them off and he did so.

An altercation occurred during the preelection period before the voting began. During that time, the Employer, Union and Board agent met in the location designated as the polling area.

Danny Bindra testified that as he was standing in the polling area before the voting occurred, he observed Union President Mendoza walking toward the warehouse. Bindra stood in front of him putting his hands at chest level and told him that he could not enter the warehouse. Mendoza advanced, aggressively pushing his chest into Bindra's chest with Mendoza's hands on Bindra's shoulders, pushing him back. Mendoza then placed his hand under Bindra's chin, and made a gun gesture with his hand, saying "I'll put you down." Bindra repeated that he could not enter the warehouse.

Bindra further stated that Mendoza raised his voice, insisting that he was "going to go inside." Bindra told him that he could not do so. At that point, according to Bindra, Zabell stepped between them, repeating that Mendoza could not enter the warehouse. Mendoza raised his hand, used profanities and told Zabell "what do you think - you're a big guy? I'll put you down too." Zabell repeated that he could not enter the warehouse.

Danny Bindra recounted that Mendoza's chest bumped Zabell's, and then Mendoza "buted" Zabell's chest with his head. Bindra denied that Zabell put his hands on Mendoza. Bindra estimated that each confrontation, that between him and Mendoza and between Zabell and Mendoza last 2 to 3 minutes.

Danny Bindra recalled that twelve to fifteen employees who were 20 to 25 feet away and were present to vote, saw the alter-

cation. The incidents ended when the Board agent separated Mendoza and Zabell, telling Mendoza to move back. Mendoza then walked to the area where the employees were standing and spoke to them. Danny and Tony Bindra stated that they saw Mendoza look at them and, once, put his finger across his throat, which Danny Bindra interpreted as a threatening gesture.

Although Danny Bindra testified that he was in fear of his life, he did not call the police. Instead, he gestured at the Board agents who replied that they had an election to conduct, but later amended this testimony to state that the Board agent stepped between Zabell and Mendoza. Bindra further stated that he asked Zabell if he should call the police and Zabell replied that the Board agents were present. Bindra conceded that he did not file assault or battery charges against Mendoza.

Tony Bindra testified that Mendoza "came to me" and said he wanted to "enter my warehouse and go all the way in." In further testimony, Tony Bindra stated that indeed, Mendoza, without saying anything, began walking 20 feet inside the warehouse when Danny told him he could not do so. Bindra specifically stated that Mendoza said nothing about the video system when he walked into the warehouse. He simply sought to walk into the warehouse for no stated reason.

In this respect, Bindra's testimony is refuted by Manager Miller who testified that the confrontation concerned "an issue about turning the cameras off and the union guy wanted to walk around the warehouse . . . it was an issue of the camera before they voted." He stated that Mendoza "tried to follow Tony to shut the cameras off and Zabell asked him to stay where we were" and not enter the warehouse.

Tony Bindra then saw Mendoza walk up to Danny who told him that he could not enter the warehouse. Then Mendoza pushed Danny and made a gun sign with his hand, telling Danny that he would take him down. Tony Bindra then saw Zabell get between the two men at which point he observed Mendoza head-butting Zabell's chest, and pushing and shoving Zabell, saying that he would "take care of you, too. He saw Mendoza put his hands on Danny's shoulders, attempting to push him back. He recalled that Mendoza was yelling, screaming and cursing at the time. He first stated that the confrontation lasted a "few minutes" and then stated that it consumed 5 to 9 minutes.

Tony Bindra noted that 12 to 14 employees were present during this incident and stood about 10 to 20 feet away. However, he also testified that "some of the [workers] were present." When asked how many, he stated that "this was a very heated situation. I didn't know what was going on so I didn't pay attention to it if there were other people there."

Tony Bindra then said that following the confrontation with Danny, Mendoza went "all the way inside" the warehouse and was stopped by Danny, and then both were engaged in a physical confrontation.

Miller stated that Mendoza came up to Zabell and when "neck and neck . . . actually bumped him." Miller added that Mendoza and Zabell were touching each other, with Mendoza threatening him. Miller said all the employees were watching this scene while they were waiting for the polls to open.

It must be noted that Miller stated that he was 15 to 20 feet

away from the confrontation and he could not hear what words were used - "the people were yelling, and you can't make out nothing." He did not hear any "specific words. "Later, when he was recalled by the Respondent, Miller's memory improved. He stated that he heard Mendoza tell Danny Bindra and Zabell that he would "take [them] down."

Tony Bindra first testified that the altercation lasted a "few minutes" and then said it took place between 5 and 9 minutes. Danny Bindra testified, alternately that it lasted 1 to 3 minutes, then 2 to 3 minutes, and then 5 to 9 minutes. Miller stated that the dispute continued for 3 to 5 minutes. There is no dispute that when the Board agent came between the men the confrontation ended.

Union President Mendoza stated that when he arrived at the polling location an employee told the Board agent there were many surveillance cameras at the warehouse and he pointed at some of them. Mendoza told the Board agent that the cameras should either be shut off or the cameras covered. The Board agent mentioned this to Zabell.

Mendoza stated that he asked for proof that the cameras were shut. Zabell said that he would have a manager or owner shut the system. Mendoza protested that either the union or the Board agent must also be certain that the cameras are shut.

At that point, according to Mendoza, Zabell began yelling, saying that he would not permit the Union to "go and make sure the cameras were off." Both he and Zabell raised their voices at each other. Mendoza stated that after he asked to see the cameras, Zabell stepped in front of him, yelling that he could not do so. Mendoza stated that Zabell came toward him and they were inches apart but did not have physical contact.

Mendoza testified that the Union was not assured of a fair election if it was not able to ensure that the cameras were shut. He did not take the owner's word that the cameras were rendered inoperable. Mendoza stated that after he was refused permission to check the cameras they continued to argue, but he did not attempt to walk into the Respondent's facility.

However he stated that after his request was denied, he attempted to walk out of the election area to observe the camera system. He stated that since he did not attempt to walk through the facility, the owners did not try to get in his way. He also denied saying "I got you" or that he made a gun gesture with his empty hand.

Mendoza stated that he believed that he had a right to "walk around" the shop as he had, in the past, been permitted to enter an employer's premises prior to an election. Mendoza stated that he did not attempt to walk inside the facility. Rather he walked only in the area where the polling area was located. Mendoza denied speaking to or making a throat slashing gesture at the Respondent's agents.

According to Mendoza the Board agent told him to bring up the matter after the election if he so chose.

Union Agent Fabres testified that he did not witness the altercation between Mendoza and Zabell but was told about it later by Mendoza. Fabres further stated that the employees were inside the shop at work at the time of the confrontation.

Argueta, the Union's election observer, testified that he saw an argument between Zabell and Mendoza. He stated that they got close to each other "like pushing and shoving" but he saw

no contact between them. The argument lasted 4 to 5 seconds. He denied seeing Mendoza make hand gestures at that time. Argueta stated that none of the employees were present during the argument as they were told to leave the area – to “hide themselves.”

Employees Roberto Reyes, Jose Michel Torres, Marvin Hernandez, Javier Reyes, and Sabillon denied seeing any argument at the election. In addition, Jose Michel Torres, Marvin Hernandez, and Sabillon denied seeing any physical confrontation. As set forth above, Argueta stated that he was the only employee present at the pre-election confrontation.

Henry Hernandez did not recall Zabell being at the election, but heard from other workers after the election that Zabell and a union agent “wanted to like fight.”

The Respondent subpoenaed Board Agent Stephanie LaTour to testify as to the events at the election. The Board granted the General Counsel’s petition to revoke the subpoena pursuant to Section 102.118(a)(1) of the Board’s Rules and Regulations on the ground that other witnesses were available to testify about the election incident.

#### Analysis

##### Objection 1

“It is the Employer’s burden, as the objecting party, to prove that there has been misconduct that warrants setting aside the election.” *Consumers Energy Co.*, 337 NLRB 752, 752 (2002).

I conclude, based on the above, that no credible evidence has been presented as to the first Objection, that the Union would call immigration authorities and have employees deported, or promised that a vote for the Union meant employees could stay in the country lawfully, or a threat by employees that various members would kill an employee if s/he voted against the union because it would mean that they would be deported.

Here, Tony Bindra’s testimony that an unnamed employee told him that an unnamed union agent threatened him with deportation and said that he could remain in the United States if he voted for the Union is simply incredible. No supporting evidence has been presented and each of the employees denied that any such comments had been made.

##### Objection 2

The second Objection alleges that the Union assaulted the Respondent’s agents and attorney at the election.

The test for evaluating conduct of a party is an objective one—whether it has the “tendency to interfere with the employees’ freedom of choice.” *Taylor Wharton Division*, 336 NLRB 157, 158 (2001). In determining whether a party’s misconduct has the tendency to interfere with employees’ freedom of choice, the Board considers: (1) the number of incidents, (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit, (3) the number of employees in the bargaining unit subjected to the misconduct, (4) the proximity of the misconduct to the election, (5) the degree to which the misconduct persists in the minds of the bargaining unit employees, (6) the extent of dissemination of the misconduct among the bargaining unit employees, (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct, (8) the closeness of the

final vote, and (9) the degree to which the misconduct can be attributed to the party.

I note first that the stipulated election agreement provided that the Employer would turn off its surveillance video cameras so that they would not be operating during the election.

Mendoza attempted to ensure that the cameras was turned off, and stated that he did not want to take the Employer’s word that it had done so. The Employer attempted to diminish this important aspect of Mendoza’s actions by its testimony of Tony Bindra that there was no agreement that it would shut the cameras, and by Danny Bindra’s testimony that Mendoza said nothing about the video system and simply wanted to enter the warehouse for no stated reason. It is significant that the Employer’s manager Miller stated, in contradiction, that the confrontation arose concerning “an issue of the camera.”

Accordingly, the Bindra brothers sought to make it appear that Mendoza’s actions were a brazen attempt to walk through the warehouse for no reason whereas Mendoza, apparently relying on the election agreement’s stipulation that the cameras were to be shut, simply wanted to confirm that fact, and made it known that that was his purpose.

Thus, it appears that Mendoza, by his own testimony, was not satisfied with the Employer’s assertion that it had shut the cameras, and he attempted to exit the election area to observe the video system, claiming, at hearing, that he had a “right” to “walk around” the shop. Miller gave believable testimony that Mendoza attempted to follow Tony Bindra when he shut the cameras off and that Zabell asked him to “stay where we were” and not enter the warehouse.

Although I credit Mendoza’s testimony that he did not try to walk through the warehouse, the evidence is clear that he did proceed at least to some point at or near the entrance of the warehouse which resulted in the Employer’s attempt to stop him. Thus, the alleged misconduct may be attributed to the Union, a party.

I further find that an argument and confrontation ensued between Danny Bindra, Zabell and Mendoza. The argument included raised voices and profanities. As set forth above, Employer representatives claimed that Mendoza, being the aggressor, made contact with Danny and Zabell, attempting to push them back. In contrast, Mendoza stated that, although he was “inches apart” from Zabell they made no contact.

I also find, as testified by Argueta, that there was “pushing and shoving.” However, he denied that there was contact between the men.

The evidence is clear that there was contact between Mendoza, Zabell and Danny Bindra. It is doubtful that angry words between men who were only “inches” away according to Argueta would not result in contact between them especially since he testified that there was “pushing and shoving.” However, I find that the contact was nothing more than the men pushing each other in the opposite direction. I do not credit the Employer’s agents that Mendoza head butted Danny and Zabell in their chests. It is not likely that such an act would have gone without the police being called by Zabell or the Employer or criminal charges being filed by them.

In making findings as to what occurred, I similarly cannot credit the Bindras or Zabell’s testimony that Mendoza made



threatening statements or threatening gestures toward them. Miller did not confirm that testimony and Mendoza and Argueta denied it. It is further noted that Miller at first denied hearing anything that Mendoza said, but later, upon recall by Zabell heard Mendoza's alleged threatening statement.

Considering the factors the Board looks at in determining whether Mendoza's conduct had a tendency to interfere with the employees' freedom of choice, only one incident took place—the confrontation between Mendoza, the Bindra brothers and Zabell. The incident occurred in the immediate vicinity of the election.

I cannot credit the Employer's evidence that the argument took as long as they said it did. It is unlikely that it lasted even a few minutes. The Board agent intervened and came between the disputants breaking it up and thereafter proceeded with the election. I accordingly find that the confrontation was quite short in duration. In this respect, I credit Argueta's testimony that the dispute lasted a few seconds.

In considering whether Mendoza's conduct was likely to cause fear among the employees it must first be determined whether any of the employees were present at the confrontation, and if not, whether that incident was disseminated among employees not present.

As set forth above, Danny Bindra and Miller testified that all the voting employees were present at the confrontation. However, Tony Bindra first stated that some employees were present. When asked how many, he said "this was a very heated situation. I didn't know what was going on so I didn't pay attention to if there were other people there." He later testified that all the employees were present. However, all the employees other than Argueta, the Union's election observer, denied that they were present or saw any arguments or confrontations.

In view of my credibility findings, above, in which I discredited the Bindra others as to material parts of their testimony, I cannot credit the Employer's agents that all the employees were present and observed the confrontation. Thus, I find that only Argueta was present. He described the dispute as "pushing and shoving," lasting only a few seconds.

Further, regarding the dissemination of the incident, Henry Hernandez stated that he heard from other workers after the election that Zabell and a union agent "wanted to like fight." Hernandez did not testify as to how many other employees spoke about this matter and he gave no further details as to what he heard. In any event, the dissemination took place after the election and thus could not have affected the employees before they voted.

There was no evidence as to whether the incident persisted in the minds of the unit employees, particularly since I find that employees, other than Argueta, were not present at the incident. There is no evidence that dissemination of the incident to the employees occurred before the election.

As to the effect, if any, of misconduct by the Employer, I credit Mendoza's testimony that Zabell stood in his way, stopping him from proceeding further. Thus, it appears that Zabell placed his body in front of Mendoza's, with both equally contributing to the physical contact which I find occurred. Accordingly, if Mendoza was originally at fault for attempting to proceed toward the warehouse, Zabell was equally at fault for

blocking his way, causing the physical contact between them.

It is not possible to determine the closeness of the final vote since five ballots were challenged and I direct, below, that four of them be opened. However, nine valid votes were cast for the Union and five were cast against it. Nine votes against five is not a close vote.

I find that the incident which occurred did not reasonably tend to interfere with the employees' free and uncoerced choice in the election. The incident was not directed at the employees, there is no credible evidence that any more than one employee, Argueta, the Union's election observer, witnessed the incident, and there is no evidence that the incident was disseminated to the other employees or that it persisted in their minds.

In addition, I cannot find that, in observing the incident, Argueta was given the impression that the Employer was "powerless against the force of the union." Rather, as in *Chrill Care, Inc.*, 340 NLRB 1016, 1016-1017 (2003), where the union's agent disrupted an employer meeting with employees and initially resisted the employer's efforts to eject her, I find that the Employer here, as was the employer in *Chrill Care*, "fully able to maintain control" by resisting Mendoza's attempt to proceed toward the warehouse. As was the case in *Chrill Care*, the union agent left the area when the police were called. Here, Mendoza backed away when the Board agent intervened.

The cases cited by the Employer, *Service Employees District 1199 (Staten Island University Hospital)*, 339 NLRB 1059, 1061 (2003), and *Central Massachusetts Joint Board*, 123 NLRB 590, 609 (1959), are inapposite. In *Staten Island University Hospital*, the union's agent engaged in a "series of open confrontations with managers" which consisted of "deliberate, repeated and unprovoked verbal abuse, including profanity, racial and sexual slurs and threats of physical harm." The Board found that the union's actions violated Section 8(b)(1)(A) of the Act. It also found that the hospital's employees, who were fully aware of the agent's actions, would reasonably tend to fear that they would be subject to the same abusive tactics if they failed fully to support the union in its bargaining position and the impending strike. The Board further found that the agent's intent in engaging in this "prolonged . . . repeated harassment was to "send this intimidating message to the hospital employee audience."

In *Central Massachusetts*, the Board found that the union agent's threatening with bodily harm and kicking an employer official as he crossed the union's picket line violated Section 8(b)(1)(A) of the Act. The Board held that the striking employees could have reasonably regarded the assault "as a reliable warning of what might befall them if they abandoned the strike" and restrained and coerced them in their exercise of their right to continue or discontinue striking as they wished.

The question here is whether the employees would reasonably fear that they would be subject to similar misconduct if they chose to fail to support the Union. I find that they would not harbor such a fear. Rather, I find that, Argueta, the sole witness to the incident, would reasonably believe that Mendoza was demonstrating his reasonable belief that the Union was entitled to ensure that the surveillance cameras were shut as agreed in the election stipulation, and that Mendoza was correct in asserting that he had a right to confirm that the cameras were turned

DEEP DISTRIBUTORS OF GREATER NY D/B/A THE IMPERIAL SALES, INC.

25

off. Argueta could therefore reasonably believe that the resulting confrontation took place because of the Employer's challenge to Mendoza's attempt to verify that the cameras were deactivated.

In sum, I view the election as reflecting the employees' free choice and I overrule this Objection.

CONCLUSIONS AND RECOMMENDATIONS

Based on the above discussion, the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh should be opened and counted. The ballot of Amjad Malik should not be opened and counted.

I shall remand the proceedings in Case No. 29-RC-146077 to the Regional Director and direct him to open and count the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh, and issue a revised tally of ballots.

If the revised tally of ballots shows that a majority of the valid votes cast at the election were cast for the Petitioner, I recommend that the Petitioner be certified. If the revised tally of ballots shows that the Petitioner has lost the election, I recommend that the election be set aside, and that all proceedings in Case No. 29-RC-146077 be vacated.

CONCLUSIONS OF LAW

1. The Respondent, Deep Distributors of Greater NY, Inc. d/b/a The Imperial Sales, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon.

3. The Respondent violated Section 8(a)(1) of the Act by giving its employees the impression that their union activities were under surveillance by the Respondent.

4. The Respondent violated Section 8(a)(1) of the Act by threatening its employees with unspecified reprisals if they selected the Union as their collective-bargaining representative.

5. The Respondent violated Section 8(a)(1) of the Act by telling its employees that it would be futile to select the Union as their collective-bargaining representative.

6. The Respondent violated Section 8(a)(1) of the Act by threatening its employees with discharge if they selected the Union as their collective-bargaining representative.

7. The Respondent violated Section 8(a)(1) of the Act by interrogating its employees about their involvement in a Fair Labor Standards Act lawsuit.

8. The Respondent violated Section 8(a)(1) of the Act by threatening its employees with unspecified reprisals because of their involvement in the filing of a Fair Labor Standards Act lawsuit.

9. The Respondent violated Section 8(a)(1) of the Act by implementing new work rules and discipline regarding cell phone use and lateness.

10. The Respondent violated Section 8(a)(1) of the Act, while in a Board hearing room, it threatened employees with legal action in retaliation for participating in a Board hearing and because of their union activity.

11. The Respondent violated Section 8(a)(1) of the Act, while in a Board hearing room, it threatened to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

12. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully implemented new work rules on July 21, 2015, regarding cell phone use and lateness, I shall order that it rescind those new work rules.

The Respondent having discriminatorily discharged and refused to reinstate Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon, it must offer them reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed, absent the discrimination against them. Further, I shall recommend that the Respondent make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In accord with *Tortillas Dan Chavas*, 361 NLRB No. 10 (2014), my recommended Order also requires the Respondent to (1) submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the employees, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse them for any additional Federal and State income taxes they may be assessed as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year.

The General Counsel requests an Order that Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon be reimbursed for their search for work and work-related expenses, without regard to whether interim earnings are in excess of these expenses. Normally, such expenses are considered an offset to interim earnings. However, the General Counsel seeks a change in existing rules regarding such expenses.

This would require a change in Board law, which is solely within the province of the Board and not an administrative law judge. Therefore, I shall not include this remedial proposal in my recommended order. The Board has recently stated that it will not order such relief at this time. *Goodman Logistics, LLC*, 363 NLRB No. 177, fn. 2 (2016).

In accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB 11, 15-16 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. *J. Piccini Flooring*, above, slip op. at 3. See *Teamsters Local 25*, 358 NLRB 54 (2012).

The General Counsel has requested certain enhanced remedies. In *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003), the Board, citing *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), stated that it "may order enhanced or extraordinary remedies when the Respondent's unfair labor practices are 'so numerous, pervasive, and outrageous' that such remedies are necessary to 'dissipate fully the coercive effects of the unfair labor practices found.'" Especially since a small bargaining unit is involved, "the probable impact of [the] unfair labor practice is increased." *Excel Case Ready*, 334 NLRB 4, 5 (2001).

In addition, the Board has found that a broad order requiring a respondent from engaging in misconduct "in any other manner," instead of a narrow order to refrain from misconduct "in any like or related manner" is necessary when a respondent has engaged in "such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979).

In addition, in such cases, the Board has ordered a respondent to furnish periodic, updated lists of employee names and addresses to the union, so that the union can help to counteract the effects of these violations in its communications with employees, and to enable the union to "present its message in an atmosphere relatively free of restraint and coercion." *Federated Logistics*, above, at 258; *Excel Case Ready*, above, at 5.

Further, the Board has required the public reading, by an official of the respondent, of a notice to its employees, so that "they will fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007).

The publication of the Notice to Employees has been found an appropriate remedy in cases such as this one. *Pacific Beach Hotel*, 361 NLRB No. 65 (2014).

I find that all of the above enhanced remedies are necessary to dissipate the serious unfair labor practices which the Respondent engaged in. As set forth above, shortly after the Union began organizing the employees, the Respondent immediately embarked on a campaign to identify the Union's supporters. The Respondent learned that Jose Michel Torres and Alex Argueta were union adherents and discharged them, along with Jose Michel Torres' brother, Jose Martin Torres. Later, after five other employees filed a FLSA lawsuit, the Respondent discharged them for not signing its unlawfully implemented rules concerning lateness and cell phone use.

The Respondent's admitted violations of the Act by threatening employees with unspecified reprisals, telling employees that it would be futile to select the Union, and threatening them

with discharge if they voted for the Union, all constitute serious violations of the Act.

Finally, and most egregiously, the Respondent attorney's threat to employees in the hearing room that he would report them to immigration authorities and that if they testified they would be committing fraud constituted extraordinary intimidation of the employee witnesses. Not only did it instill fear in them that they may be reported to governmental authorities, but it conveyed the message that if they gave testimony they would be in legal jeopardy.

Accordingly, I find that the General Counsel has established good cause for the imposition of the above enhanced remedies, and I shall order that the Respondent be required to undertake them.

However, I will not order two additional special remedies requested by the General Counsel. The General Counsel requests an Order that the Respondent be required to "schedule training for all employees on their rights under the Act conducted by a Board agent during paid worktime; and an Order requiring the Respondent to schedule training for all supervisors and managers on compliance with the Act conducted by a Board agent during paid worktime. No Board precedent has been cited for the imposition of such Orders, and no detail has been given concerning the nature or length of the training.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

#### ORDER

The Respondent, Deep Distributors d/b/a The Imperial Sales, Inc., Bethpage, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engaged in union activities, concerted activities, and because they filed a lawsuit pursuant to the Fair Labor Standards Act.

(b) Giving its employees the impression that their union activities were under surveillance.

(c) Threatening its employees with unspecified reprisals if they selected the Union as their collective-bargaining representative.

(d) Telling its employees that it would be futile to select the Union as their collective-bargaining representative.

(e) Threatening its employees with discharge if they selected the Union as their collective-bargaining representative.

(f) Interrogating its employees about their involvement in a Fair Labor Standards Act lawsuit.

(g) Threatening its employees with unspecified reprisals because of their involvement in the filing of a Fair Labor Standards Act lawsuit.

(h) Implementing new work rules and discipline regarding cell phone use and lateness.

<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.



(i) Threatening employees with legal action in retaliation for participating in a Board hearing and because of their union activity.

(j) Threatening to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

(k) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon in writing that this has been done and that their discharges will not be used against them in any way.

(d) Rescind the work rules entitled "Employee Code of Conduct" which was implemented on July 21, 2015, and notify the employees that it has done so.

(e) Within 14 days after service by the Region, hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance, at which the attached Notice to Employees" to the employees shall be read to employees by Danny Bindra, Tony Bindra, Herb Miller or Amjad Malik in English and in Spanish during worktime, or at the Respondent's option, by a Board agent in the presence of the Respondent's officials, supervisors and agents named above.

(f) Within 14 days from the date of this Order, publish in three publications of general local interest and circulation copies of the attached Notice to Employees, signed by the Respondents' general manager Tony Bindra, or his successor, and to do so at its expense. Such Notice shall be published twice weekly for a period of 8 weeks. The publications shall be determined by the Regional Director for Region 29, and need not be limited to newspapers so long as they will achieve broad coverage of the area.

(g) Upon the request of the Union, immediately furnish it with lists of the names, addresses, and classifications of all the Respondent's employees as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during a period of 2 years following the entry of this Order.

(h) Within 14 days after service by the Region, post at its fa-

cility in Bethpage, New York, copies of the attached notice marked "Appendix." <sup>11</sup> Copies of the notice, in English and in Spanish, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2015.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED as follows:

1. The Objections to the election are hereby overruled.

2. The proceedings in Case No. 29-RC-146077 are hereby remanded to the Regional Director for Region 29. He is directed to open and count the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh, and issue a revised tally of ballots.

3. If the revised tally of ballots shows that a majority of the valid votes cast at the election were cast for the Petitioner, I recommend that the Petitioner be certified. If the revised tally of ballots shows that the Petitioner has lost the election, I recommend that the election be set aside, and that all proceedings in Case No. 29-RC-146077 be vacated.

Dated, Washington, D.C. May 6, 2016

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the national Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge you because of your activity on behalf of United Workers of America, Local 660, or your concerted activities or because you filed a lawsuit pursuant to the Fair Labor Standards Act.

WE WILL NOT give you the impression that your union activities were under surveillance.

WE WILL NOT threaten you with unspecified reprisals if you select United Workers of America, Local 660 as your collective-bargaining representative.

WE WILL NOT tell you that it would be futile to select the Union as your collective-bargaining representative.

WE WILL NOT threaten you with discharge if you select the Union as your collective-bargaining representative.

WE WILL NOT interrogate you about your involvement in a Fair Labor Standards Act lawsuit.

WE WILL NOT threaten you with unspecified reprisals because of your involvement in the filing of a Fair Labor Standards Act lawsuit.

WE WILL NOT unlawfully implement new work rules and discipline regarding cell phone use and lateness.

WE WILL NOT threaten you with legal action in retaliation for participating in a Board hearing and because of your union activity.

WE WILL NOT threaten to report you to Government authorities in order to intimidate you as a witness and to discourage you from participating in Board processes.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify Jose Wilfredo Argueta, Jose

Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon in writing that this has been done and that their discharges will not be used against them in any way.

WE WILL immediately rescind the unlawfully implemented new work rules entitled "Employee Code of Conduct" which were implemented on July 21, 2015, regarding cell phone use and lateness, and notify the employees that we have done so.

WE WILL within 14 days after service by the Region, hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance, at which the attached Notice to Employees to the employees shall be read to employees by Danny Bindra, Tony Bindra, Herb Miller, or Amjad Malik in English and in Spanish during worktime, or at the Respondent's option, by a Board agent in the presence of the Respondent's officials, supervisors and agents named above.

WE WILL within 14 days from the date of this Order, publish in three publications of general local interest and circulation copies of the attached Notice to Employees, signed by the Respondent's general manager Tony Bindra, or his successor, and to do so at its expense.

Such Notice shall be published twice weekly for a period of 8 weeks. The publications shall be determined by the Regional Director for Region 29, and need not be limited to newspapers so long as they will achieve broad coverage of the area.

WE WILL upon the request of the union, immediately furnish it with lists of the names, addresses, and classifications of all the Respondent's employees as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during a period of 2 years following the entry of this Order.

DEEP DISTRIBUTORS D/B/A/ THE IMPERIAL SALES, INC.

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/29-CA-147909](http://www.nlrb.gov/case/29-CA-147909) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.





**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	
v.	)	No. 17-2250
	)	
DEEP DISTRIBUTORS OF GREATER N.Y.,	)	
INC. d/b/a THE IMPERIAL SALES, INC.	)	
	)	
Respondent	)	
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on August 7, 2017, I electronically filed the foregoing document with Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Saul D. Zabell, Esq., -  
Zabell & Associates, P.C.  
1 Corporate Drive, Suite 103  
Bohemia, NY 11716

s/ Linda Dreeben  
Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half St SE  
Washington, DC 20570

Dated at Washington, D.C.  
this 7th day of August, 2017

1						
2						
3	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
4						
5	Henry Hernandez	25	61	157	160	--
6		57				

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 A Good morning.

2 Q Mr. Hernandez, are you familiar with Deep Distributors,  
3 Imperial Sales?

4 A Yes.

5 MR. ZABELL: Objection to the form. It's a compound  
6 question.

7 JUDGE DAVIS: Overruled.

8 BY MR. POWELL:

9 Q You may answer.

10 A Yes.

11 Q How are you familiar with them?

12 A I worked a year and a half for the company, Imperial  
13 Sales.

14 Q When did you start working there?

15 A February or March of 2014.

16 Q When did you stop working there?

17 A July 21, 2015.

18 Q What did you do for them?

19 A I prepare the order. I took them off the shelf and put  
20 them up front for the manager, Herb Miller, to see them.

21 Q You said you took the orders out. What kind of products,  
22 what kind of orders were you taking out?

23 MR. ZABELL: Objection to the compound nature of the  
24 question.

25 JUDGE DAVIS: Overruled.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 BY MR. POWELL:
- 2 Q You may answer.
- 3 A Electronic house -- house electronic supplies, salon
- 4 products, frying pans, radios.
- 5 Q Mr. Hernandez, you said Herb Miller. Who is Herb Miller?
- 6 A Herb Miller is the general manager of the company.
- 7 Q Where specifically does he work?
- 8 A He works in the electronic house supply.
- 9 Q When you picked the order, you said you gave it to Herb
- 10 Miller?
- 11 A I put it in front, on a counter, for him to check it out.
- 12 Q Mr. Hernandez, does the Employer have a warehouse?
- 13 A Yes.
- 14 Q Where specifically did you work?
- 15 A At the electronic supply.
- 16 Q Was that in the warehouse?
- 17 A Yes.
- 18 Q Mr. Miller, does he have an office?
- 19 A Yes.
- 20 Q Where is his office?
- 21 A On the floor that they get the deliveries for the company,
- 22 by the door where they get the deliveries for the company.
- 23 Q And where is that? What part of the --
- 24 A In the rear part of the company.
- 25 Q Is that in the warehouse as well?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



1 A No, cash.

2 Q Could you describe a little bit more of the work you did,  
3 just so he gets an understanding.

4 MR. ZABELL: Objection to the form of the question.

5 JUDGE DAVIS: Overruled.

6 THE WITNESS: Herb Miller pick the orders, the order that  
7 the supermarket requested the company. I would brackwell (ph.)  
8 and go pick up the products from the shelves, then I put them  
9 in front, and he would check it.

10 BY MR. POWELL:

11 Q Did you ever go out on the deliveries?

12 A No.

13 MR. ZABELL: Objection. Assumes facts not in evidence.

14 JUDGE DAVIS: Overruled. Answer?

15 MR. POWELL: He answered.

16 COURT REPORTER: I didn't get the answer.

17 JUDGE DAVIS: Did you ever go out on deliveries?

18 THE WITNESS: No.

19 BY MR. POWELL:

20 Q When you were hired, Mr. Hernandez, were you ever -- were  
21 you given a handbook?

22 A No.

23 Q Were you ever given any papers, work rules?

24 MR. ZABELL: Objection.

25 JUDGE DAVIS: Sustained. More specific.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 BY MR. POWELL:

2 Q Were you ever given a paper that said it was work rules?

3 A No.

4 Q Were you ever given anything, a document about latenesses?

5 A No.

6 Q Were you ever told about work rules?

7 A No.

8 Q Were you ever told about being late?

9 A No.

10 Q How about cell phones, were you ever told that cell phones  
11 weren't used?

12 MR. ZABELL: Objection.

13 THE WITNESS: No.

14 JUDGE DAVIS: Overruled.

15 BY MR. POWELL:

16 Q Did you ever, by chance, use your cell phone?

17 THE WITNESS: At work.

18 BY MR. POWELL:

19 Q At work.

20 A Yes.

21 Q Do you know did Mr. Miller ever see you using your cell  
22 phone?

23 A Yes.

24 Q Did he say anything to you?

25 A No.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 Q How about Mr. Mallick, did he ever see you using your cell  
2 phone?

3 A Yes, but he didn't say anything. Just Mr. Miller. He  
4 didn't say anything.

5 JUDGE DAVIS: These times that they saw you, were you  
6 working at those times, or were you on break or lunch?

7 THE WITNESS: Working, on break.

8 BY MR. POWELL:

9 Q How about Mr. Bindra, do you know if he ever saw you  
10 working? Tony Bindra, did he ever see you using your cell  
11 phone when you were at work?

12 A Yes.

13 Q Did he ever tell you, you can't do it?

14 A No.

15 Q Are you familiar with Local 660, United Workers of  
16 America?

17 MR. ZABELL: Objection.

18 THE WITNESS: Yes.

19 JUDGE DAVIS: Overruled.

20 BY MR. POWELL:

21 Q By the way, how many employees -- you said you worked in  
22 the warehouse, how many employees worked in the warehouse with  
23 you?

24 MR. ZABELL: Objection to the form.

25 JUDGE DAVIS: Overruled.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 THE WITNESS: Like 18.

2 Q BY MR. POWELL: Do you know who Webster Fabrish (ph.) is?

3 A Yes.

4 Q Who is Webster Fabrish?

5 A He is a representative of Local 60.

6 Q Local 60?

7 MR. ZABELL: Objection. Asked and answered.

8 JUDGE DAVIS: Overruled.

9 BY MR. POWELL:

10 Q Did you have any dealings with Mr. Fabrish?

11 A Yes.

12 Q What were those dealings with Mr. Fabrish?

13 A I spoke with him because we wanted to work with the union,  
14 me and my workers.

15 Q When you say we, who do you mean?

16 A The rest of the workers and I.

17 Q That would be the rest of the workers at the company?

18 A Yes.

19 Q What if anything did you do to pursue that?

20 MR. ZABELL: Objection.

21 JUDGE DAVIS: Overruled.

22 THE WITNESS: I spoke to a friend. The friend gave me the  
23 number. And I spoke -- I called Webster and I spoke to  
24 Webster, and we talked about the union.

25 BY MR. POWELL:

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



- 1 Q What did you say about the union?
- 2 A That me and my workers wanted to work with the union and
- 3 we wanted to know more about the union.
- 4 Q Did you follow-up on that?
- 5 A Yes.
- 6 Q How did you follow-up?
- 7 A We had meeting. We started gathering money.
- 8 Q How often did you meet?
- 9 A Every week.
- 10 Q These meetings were with just the employees?
- 11 A Yes.
- 12 Q Did anyone -- did you meet with Webster as well, Mr.
- 13 Fabrish?
- 14 A Yes.
- 15 Q When did these meetings start?
- 16 A Like in the beginning of January.
- 17 Q January of which year?
- 18 A Of 2015.
- 19 Q You said you met once a week. Is that correct?
- 20 A Yes.
- 21 Q Do you know what -- strike that. I'm sorry. Mr.
- 22 Hernandez, do you know if Mr. Fabrish ever came to the
- 23 facility?
- 24 A Yes.
- 25 Q How do you know he came to the facility?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 A We went to meet him.
- 2 Q When you say we, who do you mean?
- 3 A All the workers.
- 4 Q Where was he when he was at the facility?
- 5 A On the street that goes over the company.
- 6 Q Was he by himself?
- 7 A Yes.
- 8 Q Was he just standing outside?
- 9 A Yes.
- 10 Q What was he doing, when he was standing outside?
- 11 THE INTERPRETER: What were you doing?
- 12 BY MR. POWELL:
- 13 Q What was he doing?
- 14 A He was only standing.
- 15 Q Was he standing with anything?
- 16 MR. ZABELL: Objection. Leading.
- 17 JUDGE DAVIS: Overruled.
- 18 THE WITNESS: Yes. He had a flag that said Local 660.
- 19 BY MR. POWELL:
- 20 Q Was he holding it or where was this flag?
- 21 A It was on his car.
- 22 Q Now do you know who Jose Mitchell Flores -- Jose Mitchell
- 23 Torres, I'm sorry.
- 24 A Yes.
- 25 Q Who is that?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 JUDGE DAVIS: I think we're okay now. After you showed  
2 the pictures to your co-workers, you said you spoke to Mr.  
3 Miller about the union, is that right?

4 THE WITNESS: Yes. He called up a meeting.

5 BY MR. POWELL:

6 Q A meeting with whom?

7 A He said that he was going to talk about the union.

8 Q But who did he call the meeting of?

9 JUDGE DAVIS: Who did he ask to attend the meeting?

10 THE WITNESS: All workers.

11 BY MR. POWELL:

12 Q In the entire company?

13 MR. ZABELL: Objection.

14 JUDGE DAVIS: Overruled.

15 THE WITNESS: All of them except the five that were  
16 checking out UPS.

17 BY MR. POWELL:

18 Q So did this include people -- besides the warehouse  
19 people, are there other departments?

20 MR. ZABELL: Objection.

21 JUDGE DAVIS: Overruled.

22 THE WITNESS: We were from the area of electronics and the  
23 beauty supplies, the beauty salon supplies.

24 BY MR. POWELL:

25 Q Was it at the warehouse area?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 MR. ZABELL: Objection and move to strike. He asked a  
2 question regarding about what time. There's been no time  
3 frame. There's been no testimony. So I move to strike the  
4 question and the answer.

5 JUDGE DAVIS: Do you want to clarify that? At what time?

6 BY MR. POWELL:

7 Q Around the time of this meeting.

8 MR. ZABELL: Objection, what meeting?

9 MR. POWELL: The meeting we were just discussing where Mr.  
10 Miller --

11 JUDGE DAVIS: Okay.

12 THE WITNESS: Yes.

13 BY MR. POWELL:

14 Q There was an election in this case, correct?

15 MR. ZABELL: Objection. Leading.

16 JUDGE DAVIS: Overruled.

17 THE WITNESS: Yes.

18 BY MR. POWELL:

19 Q After the election, do you know were employees still  
20 meeting with the union?

21 MR. ZABELL: Objection.

22 JUDGE DAVIS: Did you meet with the union after the  
23 election?

24 THE WITNESS: Yes.

25 BY MR. POWELL:

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



1 Q What happened at these meetings?

2 A We spoke that we were going to work normally. We were not  
3 going to talk inside the company.

4 Q Was there any other things that were discussed at this  
5 meeting?

6 A Yes.

7 Q And what was discussed?

8 A About the extra hours we worked.

9 Q Extra hours. Do you mean overtime?

10 MR. ZABELL: Objection.

11 JUDGE DAVIS: Overruled.

12 THE WITNESS: Yes.

13 BY MR. POWELL:

14 Q What was discussed about the overtime?

15 A We talked about that we wanted to be covered the extra  
16 hours that we worked and we asked him about that, and he said  
17 yes, that he was going to get a lawyer.

18 Q Do you know if he ever did do that?

19 A Yes.

20 Q I'm sorry, Mr. Hernandez. One question going back to the  
21 meeting that you had with -- that the employees had with Mr.  
22 Miller, what language was that meeting conducted in?

23 A In Spanish.

24 Q Does Mr. Miller speak Spanish?

25 A Yes.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 BY MR. POWELL:

2 Q How did the meeting end?

3 A I said I am going to go, my friend is waiting for me  
4 outside and I don't want to lose my ride. And he said hold on,  
5 if you're going to fight, we'll fight in court.

6 Q Who said that?

7 A Tony.

8 Q Was anything else said?

9 A He said that the union didn't have nothing to do with it,  
10 that it was between the workers and him. And he said that if  
11 he won, he was going to make us pay the bills for the case.

12 Q Was that the end of the meeting?

13 A Yes.

14 Q Mr. Hernandez --

15 MR. POWELL: Permission to approach, Your Honor?

16 JUDGE DAVIS: Yes.

17 (General Counsel's GC-2(a) & 2(b) identified.)

18 BY MR. POWELL:

19 Q Mr. Hernandez, I'm showing you what's been marked as  
20 General Counsel's Exhibit 2(a). Do you recognize this  
21 document?

22 MR. ZABELL: Judge, I would just like to confirm that  
23 GC-2(a) is a two-page document? Can I get a confirmation of  
24 that?

25 MR. POWELL: General Counsel's 2 is a two-page document,

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 2(a) being the top page, which is in Spanish; 2(b) being the  
2 bottom page, which is in English.

3 MR. ZABELL: That wasn't what came across. GC-2(a) is  
4 Spanish and 2(b) is English.

5 MR. POWELL: Sorry. I didn't say that loud enough. I'm  
6 sorry, I apologize.

7 MR. ZABELL: You're forgiven.

8 BY MR. POWELL:

9 Q Do you recognize this document?

10 A Yes.

11 Q What is it?

12 A On payday, when I went to pick up my paycheck or my  
13 payment -- on payday, when I went to pick up my payment, the  
14 girl who works at counter told me that I had to sign that  
15 paper.

16 Q What is this paper?

17 A It said that we couldn't use cell phones at work. It said  
18 that we couldn't go late to work, otherwise, we would be  
19 sanctioned.

20 MR. POWELL: Any objection to putting this in? I don't  
21 think there is any objection.

22 MR. ZABELL: I don't think you laid an appropriate  
23 foundation, but I have no objection.

24 JUDGE DAVIS: GC-2(a) and (b) are received.

25 (General Counsel's GC-2(a) and 2(b) received.)

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 BY MR. POWELL:

2 Q Was this the first time anyone had given you anything  
3 regarding cell phones?

4 THE INTERPRETER: Counsel, you said the first time or the  
5 only time?

6 MR. POWELL: The first time anybody gave you anything  
7 regarding cell phones.

8 THE WITNESS: Yes.

9 BY MR. POWELL:

10 Q Was this the first time anyone had talked about a time and  
11 attendance policy?

12 A Yes.

13 Q What, if anything, did you do with this?

14 A I didn't sign it.

15 JUDGE DAVIS: When did you receive it? What date, if you  
16 remember?

17 THE WITNESS: July 21st.

18 BY MR. POWELL:

19 Q Did anything else happen on July 21st?

20 A The girl who pays was making a list of the people who  
21 didn't sign. So at the end, when I was going out, there was  
22 the manager and the supervisor, and they called us into the  
23 office. Tony called us into the office and he had the payment  
24 for that day. And he called the list of the five, of my  
25 co-workers was there, Roberto, Augustin, Javier, Henry, come.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



1 He said come and he gave us that paper that day, and he made a  
2 fine, stated that that was the last day of work for us.

3 Q Did he say anything else to you?

4 A He only said the last day.

5 Q Did he say why it was the last payment?

6 A He didn't say.

7 Q Did he say that it was because you didn't sign this paper?

8 MR. ZABELL: Objection. He just testified that he did not  
9 say anything.

10 JUDGE DAVIS: Overruled.

11 BY MR. POWELL:

12 Q Did he say that?

13 A No, he didn't say that, but I know it is that way because  
14 the girl who made the payments was making the list.

15 MR. ZABELL: Objection, move to strike as nonresponsive.

16 JUDGE DAVIS: Sustained.

17 MR. POWELL: I have nothing further.

18 JUDGE DAVIS: You mentioned that Tony, the supervisor, and  
19 the manager called the five workers over. First, the four of  
20 them were together. Then Tony and his brother went to her  
21 office.

22 JUDGE DAVIS: I'm just asking you, you said two people,  
23 the supervisor and the manager, Tony, and who is the other  
24 person?

25 THE WITNESS: Tony and the brother.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 recalls it. If he doesn't recall it, then I'll move on. But I  
2 believe that that's what he said.

3 JUDGE DAVIS: Ask a new question, okay?

4 BY MR. ZABELL:

5 Q Do you recall testifying about not having a good social  
6 security number?

7 MR. POWELL: Objection.

8 MR. ZABELL: That's an exact quote.

9 MR. POWELL: Objection. No, it is not.

10 JUDGE DAVIS: Sustained.

11 BY MR. ZABELL:

12 Q Do you have a good social security number?

13 MR. POWELL: Objection.

14 JUDGE DAVIS: Mr. Zabell, I don't think you're hearing me.  
15 We're not getting into questions of social security or  
16 authorization to work in the United States. It's irrelevant to  
17 this case.

18 MR. ZABELL: Actually, Judge, when he testified about it  
19 on direct examination, it was brought out because counsel for  
20 the General Counsel didn't believe it was irrelevant to this  
21 case because they think it's an important threat. They count  
22 it as one of their unspecified reprisals that this individual  
23 was threatened. So if he testified on direct examination that  
24 he was told that he would have to get a good social security  
25 number, I get to question him about that. I get to see if that

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 Q You said before that Alex -- you know who Alex, Martin,  
2 and Mitchell are, correct?

3 A Yes.

4 Q Did you continue to work after they were let go?

5 A Yes.

6 Q Do you know if the Employer hired any new employees?

7 MR. ZABELL: Objection, beyond the scope of cross-  
8 examination.

9 JUDGE DAVIS: Overruled.

10 THE WITNESS: Yes.

11 BY MR. POWELL:

12 Q Did they?

13 A Yes.

14 Q How many?

15 MR. ZABELL: Renew my objection.

16 THE WITNESS: One or two.

17 JUDGE DAVIS: Overruled.

18 BY MR. POWELL:

19 Q Do you know their names?

20 A One, I don't know. The other one, I do know. I know that  
21 he is the nephew of Roberto Flores.

22 Q Do you know when they were hired?

23 MR. ZABELL: Objection, beyond the scope of cross-  
24 examination.

25 JUDGE DAVIS: Overruled.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1						
2			<u>I N D E X</u>			
3	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
4						
5	Augustine Sabillon	200	--	--	--	--
6						
7	Herbert Miller	242	290	314	--	--

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 THE INTERPRETER: Webster, right?  
2 BY MS. CABRERA:  
3 Q From the union representatives.  
4 MR. ZABELL: Objection.  
5 JUDGE DAVIS: Rephrase the question, please.  
6 BY MS. CABRERA:  
7 Q On this first occasion when you stopped to stand with the  
8 union representatives outside the company's facility, were  
9 there any other employees?  
10 MR. ZABELL: Objection. That's not what he testified to.  
11 JUDGE DAVIS: This is a new question. Overruled.  
12 THE WITNESS: Yes.  
13 BY MS. CABRERA:  
14 Q Who was there?  
15 A There was Armando, Melvin, Javier, Seldeen, Alman, Martin,  
16 Ali, all of them, all of us were there.  
17 Q How long did you stay?  
18 A About two, three minutes.  
19 Q What did you do after?  
20 A I went inside.  
21 Q What about the other workers?  
22 A We entered, all of us, at the same time.  
23 Q Do you know how long the union remained outside the  
24 facility?  
25 A I don't know. I think they stayed for about five more

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



1 minutes. We all went inside. We didn't see them.

2 Q Do you know if the union ever came back with their van?

3 A Yes.

4 Q How many times did they come back?

5 A About three times.

6 Q What time of day did they come back on these other three  
7 occasions?

8 A The same time.

9 Q On those other three occasions, did you stop to talk to  
10 them as well?

11 A Yes.

12 MR. ZABELL: Excuse me, Judge?

13 JUDGE DAVIS: Off the record.

14 (Pause off the record from 12:07 p.m. to 12:08 p.m.)

15 JUDGE DAVIS: This individual who walked into the room,  
16 Mr. Powell?

17 MR. POWELL: Your Honor, that's --

18 MS. CABRERA: Roberto Mendoza, president.

19 MR. POWELL: He's the president of the union. As the  
20 union is a Charging Party, he's entitled to be in here.

21 MR. ZABELL: My position is this, this is the individual  
22 who physically threatened both myself and --

23 MS. CABRERA: Allegedly.

24 MR. ZABELL: -- other individuals --

25 MS. CABRERA: Allegedly.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 A I would say between 14 and 16.
- 2 Q These employees, could you describe for the Judge what
- 3 they do. They pick orders, right?
- 4 A Correct.
- 5 MR. ZABELL: Objection to the form.
- 6 JUDGE DAVIS: You asked two questions there. Describe
- 7 what they do.
- 8 BY MR. POWELL:
- 9 Q Describe what they do.
- 10 A We get orders from stores, and they generally go out and
- 11 pick the merchandise, and bring it up on pallets for me to
- 12 check.
- 13 Q What type of business is --
- 14 A It's beauty and small appliances.
- 15 Q What do you mean, do you manufacture?
- 16 A No, we distribute. We're a distributor.
- 17 Q So you get the products from someplace else and what
- 18 happens?
- 19 A We store it. And then when orders come in, we pick it
- 20 from the place where it is and we create orders for it.
- 21 Q These orders, who do they come from?
- 22 A From customers, from stores.
- 23 Q From stores?
- 24 A Yes.
- 25 Q Supermarkets?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1  
2

	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
3						
4	Augustin Sabillion	344	376	407	408	--
5	Jose Michel Torres	411	434	456	457	--

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 A No, because on the contrary it was -- there was more work,  
2 because trailers of trailers -- of products came in. As well  
3 as they went out, they also came in.

4 Q Now, keeping your attention on the same time period, did  
5 you attend a meeting at the facility held by Herb Miller?

6 A Yes.

7 Q Do you recall what date that took place?

8 A Yes.

9 Q What date was that?

10 A March 15th.

11 Q And --

12 JUDGE DAVIS: Year?

13 THE WITNESS: 2015.

14 MS. CABRERA: Do you recall where it took place?

15 THE WITNESS: In front of the office of Mr. Herb (*sic*).  
16 We were all standing on the ground.

17 BY MS. CABRERA:

18 Q And do you recall who was present, as far as employees?

19 A Yes.

20 Q And who was present?

21 A There was Marvin, there was Henry, there was Robert, there  
22 was Silvi (ph), there was Javier, there was Don Hermando (ph),  
23 there was Oman (ph) and myself.

24 Q Just for context purposes only. Can you briefly tell us  
25 what the meeting was about?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 MR. ZABELL: Objection to the form.

2 JUDGE DAVIS: Overruled.

3 THE WITNESS: Yes.

4 BY MS. CABRERA:

5 Q Okay. And what was it about?

6 A Mr. Herb (*sic*) threatened us. He told us that if we got  
7 into the Union and the Union won, there was going to be no  
8 work. We were not going to work anymore.

9 That he was going to impose his own laws. And he'd  
10 respected us. And he started saying other things that were not  
11 a part of the case, such as he started saying a lot of  
12 vulgarities. He cursed at us.

13 Q What time of day did the meeting take place?

14 A By the morning.

15 Q And do you recall how long the meeting lasted?

16 A 15 minutes.

17 Q Did you record this meeting?

18 A I did, yes.

19 Q What did you record the meeting with?

20 A With my phone.

21 Q Do you still have that telephone?

22 A Yes.

23 Q Do you have the telephone here today?

24 A Yes.

25 Q Did you tape the entire meeting?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



1 A All of it.

2 Q Did you ever pause the tape at any point during the

3 meeting?

4 A Yes.

5 Q While your phone was recording the meeting, did you stop

6 the recording at any point --

7 MR. ZABELL: Objection.

8 MS. CABRERA: -- while Herb Miller was talking?

9 MR. ZABELL: Asked and answered.

10 JUDGE DAVIS: Overruled.

11 MR. ZABELL: He just testified that he paused the

12 recording, Judge.

13 JUDGE DAVIS: I understand.

14 MS. CABRERA: I think he understands the question.

15 MR. ZABELL: Then I'm going to object. She's trying to

16 impeach her own witness and this is not the first time.

17 JUDGE DAVIS: Overruled.

18 THE WITNESS: No.

19 BY MS. CABRERA:

20 Q Okay. Now, you said you have that phone here today?

21 A Yes.

22 Q Okay. You said that the meet -- you testified that the

23 meeting took place on March 15th. How do you know that?

24 A I have the date on my phone when I recorded the recording.

25 Q Okay. Can you take your phone out now and show us?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 A Yes.

2 MS. CABRERA: Your Honor, I'm not quite sure how you want  
3 to do it. I actually have a printout of the screen that shows  
4 the date that he made the recording. I have copies for  
5 everybody. I'd be happy for Your Honor to take a look at his  
6 phone --

7 JUDGE DAVIS: Alright.

8 MS. CABRERA: -- to see.

9 JUDGE DAVIS: We'll do both things. Give copies of that  
10 to counsel and to me and --

11 MS. CABRERA: Sure. I'm going to mark --

12 MR. ZABELL: And Judge, I would like an opportunity to  
13 inspect the phone. And I don't need to touch it, but if he  
14 gets it on that screen so I can compare it to what counsel has  
15 been provided.

16 JUDGE DAVIS: I'll ask you to come up at an appropriate  
17 time. GC-11 is the next exhibit.

18 MS. CABRERA: Can I make it 11(a) and (b)? Is that --

19 JUDGE DAVIS: Yes.

20 MS. CABRERA: -- alright?

21 JUDGE DAVIS: Yeah. What's 11 -- what's (a) and what's  
22 (b)?

23 MS. CABRERA: So (a) is going to be the recording of the  
24 March meeting and (b) will be the screenshot of the recording  
25 of the July meeting. Okay. So can you --

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 (General Counsel's 11(a) & (b) identified0

2 MR. ZABELL: Wait, wait. I just have (a). I don't have  
3 (b).

4 MS. CABRERA: I haven't put in (b). I figured it would --  
5 I mean I could put it in now or I could wait until he testifies  
6 about the July meeting.

7 JUDGE DAVIS: Let's put it in now, because --

8 MS. CABRERA: Okay.

9 JUDGE DAVIS: -- you mentioned it --

10 MS. CABRERA: Will do.

11 JUDGE DAVIS: Okay. So you're going to show him the phone  
12 now, is that right?

13 MS. CABRERA: Yeah.

14 JUDGE DAVIS: Okay. Let's all come up and we'll take a  
15 look. Put it in front of you, right over here. The telephone,  
16 put it on the table. Okay. Go ahead. Question?

17 MS. CABRERA: Okay.

18 CONTINUED DIRECT EXAMINATION

19 BY MS. CABRERA:

20 Q Okay. So can you just show -- we'll start with the Judge.  
21 Can you show us where it shows the date of the recording that  
22 you made of that March meeting?

23 A Yes.

24 Q Can you point it out for the Judge, please?

25 A (In English) Yes.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 MS. CABRERA: Okay. So for the record he's pointing --  
2 we'll show the Judge first.

3 BY MS. CABRERA:

4 Q It says (in Spanish) nueva grabacion dos. Is that the  
5 recording? Is that the --

6 A Yes.

7 Q -- March meeting with Miller?

8 A Yes.

9 JUDGE DAVIS: So that's what we're looking at GC-11(a) --

10 MS. CABRERA: Yes.

11 JUDGE DAVIS: -- is that right?

12 MS. CABRERA: That would be G -- yes.

13 BY MS. CABRERA:

14 Q So my next question is if you take a look at GC-11(a), is  
15 this a printout of that same screen?

16 MR. ZABELL: I'll so stipulate.

17 JUDGE DAVIS: The stipulation is received. The  
18 stipulation is received.

19 THE WITNESS: Yes.

20 BY MS. CABRERA:

21 Q Okay. And can you please read the date for me of that  
22 meeting? Please read the date.

23 MR. ZABELL: I'll stipulate that it's the date that's  
24 indicated on the exhibit.

25 MS. CABRERA: Okay.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 the overtime?

2 A Yes, he helped us.

3 Q And how did --

4 A His working.

5 Q -- you know? And how did you know?

6 A We are in contact with them.

7 Q Calling your attention to July 15th 2015, did you attend a  
8 meeting with Tony Bindra?

9 MR. ZABELL: Objection, leading.

10 JUDGE DAVIS: Overruled.

11 THE WITNESS: Yes.

12 BY MS. CABRERA:

13 Q And where did that meeting take place?

14 A At the new building. We were sitting down. We had put  
15 some tables -- seats on the tables. And we were eating and  
16 that's where the meeting happened.

17 Q You said at the new building. Do you recall when you  
18 moved to the new building?

19 A Yes, it was somewhat before the month of July. June,  
20 July. Yes, June.

21 Q Going back to the meeting, do you recall what time of day  
22 it was?

23 A Yes.

24 Q What time was it?

25 A That was in the afternoon, once we were leaving -- about

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



1 for us to leave.

2 Q And who was present for this meeting on behalf of the  
3 company?

4 A Mr. Tony (*sic*) and Mr. Herb (*sic*).

5 Q Does Mr. Tony (*sic*) speak Spanish?

6 A No.

7 Q Does Mr. Herb Miller?

8 A Yes.

9 Q As far as employees, who was present?

10 A There was Marvin, there was Henry, there was Javier, there  
11 was Silvi, there was Hermando, there was Oman, and there was  
12 Robert and myself.

13 Q How did the meeting start?

14 A We were all sitting down and then Mr. Tony (*sic*) came over  
15 with some papers and he said this is a complaint that he had  
16 filed. And he showed it to us and he said all of you are here,  
17 inscribed here. And yes, we were all inscribed there. And  
18 that's how the meeting started.

19 Q Did Mr. Tony Bindra ask you anything specific?

20 A Yes.

21 Q What did he ask you?

22 A He said did you put your name down here? And I said yes.

23 Q Okay. Did he say anything else?

24 A All of us were inscribed there and then he asked how do  
25 you know? I said right. I don't want to talk, because I don't

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 have a lawyer. And no one wanted to talk. So I said okay.  
2 I'm going to be the one who is going to talk.

3 THE INTERPRETER: And I lost track. Could I ask the  
4 witness to repeat himself?

5 MS. CABRERA: That's going to be up to the Judge.

6 JUDGE DAVIS: Go ahead.

7 THE WITNESS: He came, and he gave me the papers and he  
8 threw the papers at me. He said oh, look at it. All of you  
9 are inscribed here. Do I owe some of you?

10 JUDGE DAVIS: Who was doing the talking?

11 THE WITNESS: Mr. Tony (*sic*).

12 BY MS. CABRERA:

13 Q Was Mr. Tony (*sic*) speaking in English or Spanish?

14 A He was speaking in English.

15 Q And what was Mr. Miller doing?

16 A He was there sitting as well.

17 Q Was he talking during this meeting?

18 A Yes, as well.

19 Q Was he speaking in English or Spanish?

20 A In Spanish.

21 Q Was he translating for Mr. Bindra?

22 MR. ZABELL: Objection, leading.

23 JUDGE DAVIS: Overruled.

24 MS. CABRERA: Do you need me to repeat the question?

25 THE WITNESS: Yes.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 MS. CABRERA: I asked if Mr. Miller was translating for  
2 Mr. Bindra during this meeting?

3 THE WITNESS: There was Jairo.

4 MR. ZABELL: Move to strike as non-responsive.

5 JUDGE DAVIS: I didn't understand the answer.

6 BY MS. CABRERA:

7 Q So if I may just repeat the question?. The question is was  
8 Mr. Miller translating for Mr. Bindra during this meeting?

9 MR. ZABELL: Asked and answered.

10 JUDGE DAVIS: Overruled.

11 THE WITNESS: Yes.

12 BY MS. CABRERA:

13 Q During this meeting did you hear Mr. Bindra say out loud  
14 any other employee's names?

15 MR. ZABELL: Objection, leading.

16 JUDGE DAVIS: Overruled.

17 THE WITNESS: Yes.

18 BY MS. CABRERA:

19 Q Who's names did he say out loud?

20 A He mentioned Valerio. It's people that don't work there  
21 for a long time. He mentioned the name of everyone.

22 Q Now, just for clarification, you -- did you record this  
23 meeting?

24 MR. ZABELL: Objection.

25 JUDGE DAVIS: Overruled.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 THE WITNESS: Yes.

2 BY MS. CABRERA:

3 Q And how long did the meeting last?

4 A The meeting lasted 15 minutes, 14 to 15.

5 Q What did you record the meeting with?

6 A With my phone.

7 Q Where was your phone?

8 A I have it now with me.

9 Q And did you record the entire meeting?

10 MR. ZABELL: Objection, leading.

11 THE WITNESS: All of it.

12 JUDGE DAVIS: Overruled.

13 BY MS. CABRERA:

14 Q When was your last day of employment?

15 A It was July 25th.

16 JUDGE DAVIS: Year?

17 THE WITNESS: 2015.

18 BY MS. CABRERA:

19 Q And who told you that it was your last day?

20 MR. ZABELL: Objection, assumes facts not in evidence.

21 JUDGE DAVIS: Overruled.

22 THE WITNESS: Mr. Tony (sic).

23 BY MS. CABRERA:

24 Q And what did he say?

25 A He only gave me the days that he owed me and he say only

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 no more work.
- 2 Q What time of day was it?
- 3 A Leaving time. 5:00.
- 4 Q Prior to this did you have a conversation with any member  
5 of management about work rules?
- 6 MR. ZABELL: Objection, leading.
- 7 THE WITNESS: Yes.
- 8 JUDGE DAVIS: Overruled.
- 9 BY MS. CABRERA:
- 10 Q And who did you speak to?
- 11 A Before that Mena (ph) came, when he going to -- he was  
12 going to pay us. And he brought some papers with the rules.  
13 And they were no phone, no lateness, otherwise we were going to  
14 be fired. He also had some papers for us to sign and if we  
15 didn't sign it we were going to be fired.
- 16 Q Who is Mena?
- 17 A She is the one they have there, the secretary, to pay and  
18 to do other --
- 19 Q What time of day did this conversation with Mena take  
20 place?
- 21 A It was around 2:00 O'clock in the afternoon, 1:00.
- 22 Q And where did you have this conversation with Mena?
- 23 A In Mr. Mallick's office.
- 24 Q And how did you come to be inside of Mr. Mallick's office?
- 25 A Because she went into Mallick's office to pay us, and

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



1 that's when she gave us the paper and she wanted a response,  
2 such as no phone use, no latenesses, etc.

3 Q So you were already in the office? You were already in  
4 Mr. Mallick's office?

5 MR. ZABELL: Objection, that's a statement to which no  
6 response is required and could not be any more leading.

7 JUDGE DAVIS: Sustained.

8 BY MS. CABRERA:

9 Q What were you doing in Mr. Mallick's office?

10 MR. ZABELL: Objection, asked and answered.

11 JUDGE DAVIS: Overruled.

12 THE WITNESS: Mena was inside the office and she was  
13 paying us there.

14 BY MS. CABRERA:

15 Q I'm going to show you what has already been marked as GC,  
16 I believe this is 2(b). It's either 2(a) or 2(b). I'm not  
17 sure which one is the Spanish version of the work rules.

18 MS. CABRERA: Someone can help me out?

19 JUDGE DAVIS: 2(a) is Spanish.

20 MS. CABRERA: Okay, thank you. Was that the document that  
21 Mena gave to you?

22 THE WITNESS: Yes.

23 BY MS. CABRERA:

24 Q Was this the first time you had ever received work rules  
25 in writing?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 A Yes.

2 Q What did you do with the paper?

3 MR. ZABELL: Objection.

4 JUDGE DAVIS: Overruled.

5 THE WITNESS: I didn't sign.

6 BY MS. CABRERA:

7 Q Did you keep a copy?

8 A No.

9 Q Did you tell Mena that you weren't going to sign?

10 A Yes.

11 Q And what did she say?

12 A No problem.

13 Q Now, going back to your conversation at the end of the day

14 with Herb Miller, wherein he told you that you were terminated.

15 MR. ZABELL: Objection.

16 JUDGE DAVIS: Sustained.

17 BY MS. CABRERA:

18 Q At the end of the day what did Mr. Herb Miller tell you?

19 MR. ZABELL: Objection.

20 JUDGE DAVIS: Overruled.

21 THE WITNESS: He didn't say anything.

22 BY MS. CABRERA:

23 Q Where were you for this conversation with Mr. Miller?

24 MR. ZABELL: Objection. He just testified that Herb

25 Miller didn't say anything, indicating --

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

(1:12 P.M.)

1 that you started?

2 THE WITNESS: 2011-2012.

3 JUDGE DAVIS: Okay. Thank you.

4 BY MS. CABRERA:

5 Q And when did you stop working?

6 A Recently in February. March 6th was the last day I  
7 worked.

8 Q And what year? Excuse me.

9 A Of this year.

10 Q Can you state -- of 2105?

11 A Uh-huh.

12 JUDGE DAVIS: You have to answer yes or no.

13 THE WITNESS: Yes.

14 BY MS. CABRERA:

15 Q And what position did you work in?

16 A I collected boxes.

17 Q Did you do anything else?

18 A Drive -- operate machinery.

19 Q What kinds of machines?

20 A Hi-lo.

21 Q Who was your supervisor?

22 A Herman.

23 Q Was he always your supervisor?

24 A Yes, for about two years then another.

25 Q And then after two years who became your supervisor?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 Q What about Mr. Bindra, did he ever tell you there were  
2 work rules regarding lateness?
- 3 A No.
- 4 Q Are you familiar with a union by the name of Local 660?
- 5 A Yes.
- 6 Q And how are you familiar with them?
- 7 A Because we met with them.
- 8 Q When was the first time you met with them?
- 9 A The first week of January. Yes.
- 10 Q And where did that meeting take place?
- 11 A We met at Burger King.
- 12 Q Was this the only meeting that you attended?
- 13 A No.
- 14 Q About how many did you attend?
- 15 A About six, five.
- 16 Q Did you ever sign anything at any of these meetings?
- 17 A Yes.
- 18 Q What did you sign?
- 19 A A card, a little card.
- 20 Q Do you know if any of the Union representatives ever came  
21 to the Imperial Sales facility?
- 22 A Yes.
- 23 Q And we'll start with who. Who did you -- who came to the  
24 facility?
- 25 A Webster.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 Q And when did you see him come to the facility?
- 2 A In the morning.
- 3 Q When was the first time you saw him?
- 4 JUDGE DAVIS: The date, please, if you know it.
- 5 THE WITNESS: I don't remember.
- 6 BY MS. CABRERA:
- 7 Q Do you remember the month?
- 8 A Yes.
- 9 Q What month was it?
- 10 A January.
- 11 Q And where did you see him at the facility?
- 12 JUDGE DAVIS: What year in January?
- 13 MS. CABRERA: Sorry. What year?
- 14 THE WITNESS: Of this year, 2015. No. Yes.
- 15 BY MS. CABRERA:
- 16 Q And where did you see him?
- 17 A In front of the building.
- 18 Q And what was he doing?
- 19 A Nothing. With a car with a sign.
- 20 Q And where was the sign in relation to the car?
- 21 A On the side.
- 22 Q How big was the sign?
- 23 A Almost the height of the car. The height of the car.
- 24 Q This first time that you saw him in January, did you go up
- 25 to him to talk to him?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



1 MR. ZABELL: Objection.  
2 JUDGE DAVIS: Overruled.  
3 THE WITNESS: Yes.  
4 BY MS. CABRERA:  
5 Q What time of day was it?  
6 A In the afternoon.  
7 Q Was it before or after work?  
8 A Yes.  
9 Q Which one, before or after work?  
10 A After work.  
11 Q And how long did you talk to him?  
12 A About 20 minutes.  
13 Q Were you alone with him?  
14 A No.  
15 Q Who were you with?  
16 A With five more employees.  
17 Q Who were they?  
18 A With five more coworkers.  
19 Q Who were they?  
20 A There was Marvin, Henry, I, my brother and Robert --  
21 Roberto.  
22 Q Who is your brother?  
23 A Jose Martin Torres.  
24 Q Okay. We'll get to him in a second. How many -- was this  
25 the only time that you saw Webster at the facility?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 Q Calling your attention to February 17th 2015 --  
2 JUDGE DAVIS: Excuse me.  
3 MS. CABRERA: Yeah.  
4 JUDGE DAVIS: Mr. Powell, could you prop open the back?  
5 It's very hot in here.  
6 MR. POWELL: Oh, certainly.  
7 JUDGE DAVIS: Okay. February 17th --  
8 MS. CABRERA: Calling your attention to February 17th of  
9 2015, did you have a conversation with anyone from management  
10 about the Union?  
11 MR. ZABELL: Objection, leading.  
12 MS. CABRERA: Just trying to focus his attention --  
13 JUDGE DAVIS: Overruled.  
14 THE WITNESS: Yes.  
15 BY MS. CABRERA:  
16 Q And who spoke to you?  
17 A Miller. Ah, Mallick. Mallick, I'm sorry.  
18 Q And where were you?  
19 A In the area of women's products.  
20 Q Were you working?  
21 A Yes.  
22 Q Were you alone?  
23 A No.  
24 Q Who were you with?  
25 A Alex, Wilfred.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 Q Do you know his last name?
- 2 A Argueta.
- 3 Q And what did Mr. Mallick say to you?
- 4 A He came, he approached us and he said that we were part of
- 5 a union. So we looked at him, and we said nothing and he left.
- 6 Q Did you ever receive any written discipline for being
- 7 lazy?
- 8 A No.
- 9 JUDGE DAVIS: Discipline for what?
- 10 MS. CABRERA: For being lazy.
- 11 JUDGE DAVIS: Lazy.
- 12 BY MS. CABRERA:
- 13 Q Is there a break room?
- 14 A No.
- 15 Q When you're on break where do you take your breaks?
- 16 MR. ZABELL: Objection, assumes facts not in evidence.
- 17 MS. CABRERA: Do you take a break?
- 18 THE WITNESS: Yes.
- 19 BY MS. CABRERA:
- 20 Q how long is that break?
- 21 A At 1:45 for 45 minutes.
- 22 Q And where do you go for your break?
- 23 A We ate in the --
- 24 Q Is there a lunchroom?
- 25 A No.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 THE INTERPRETER: When or how?

2 JUDGE DAVIS: How.

3 THE WITNESS: Good.

4 JUDGE DAVIS: You last day or work what happened, if  
5 anything?

6 THE WITNESS: He called us to his office and he said that  
7 he had a message from his boss, the owner of the company, that  
8 there was not a lot of work and he paid us there.

9 JUDGE DAVIS: Who was talking to you then?

10 THE WITNESS: Miller.

11 JUDGE DAVIS: Okay.

12 BY MS. CABRERA:

13 Q And where did this conversation take place?

14 A In front of the company at the office -- in the office.

15 Q Were you alone?

16 A No.

17 Q Who were you with?

18 A I was with Alex Martin (ph) and the rest of the coworkers.

19 Q Was anyone else from management present?

20 A No, only him.

21 Q Did Mr. Miller ever say to you that you were being fired,  
22 you were being laid off because of your work performance?

23 A No, because there was no work at the company. And I've  
24 never failed to work. I always work there.

25 Q So at the time that you were terminated, was there no --

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 was there -- was work slow?

2 MR. ZABELL: Objection.

3 THE WITNESS: No.

4 JUDGE DAVIS: Overruled.

5 BY MS. CABRERA:

6 Q And how do you know?

7 MS. CABRERA: I think the translator needs him to repeat  
8 his answer.

9 JUDGE DAVIS: How do you know that work was slow is the  
10 question?

11 MS. CABRERA: Think he's just having -- the translator is  
12 having trouble translating a word that he used.

13 THE WITNESS: The orders that we get that they sell.

14 BY MS. CABRERA:

15 Q What about them?

16 A There was a lot of work, a lot of it.

17 Q Were you the only one who was fired that day?

18 A No.

19 Q Who else did they fire?

20 A Martin and Alex. Alex is the same as Martin. Three.

21 Q In the time that you worked there did you ever know of any  
22 employees who were laid off because there was not enough work?

23 A Never.

24 MS. CABRERA: I have nothing further, Your Honor.

25 JUDGE DAVIS: Thank you. Mr. Zabell?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 JUDGE DAVIS: Thank you. Any redirect?

2 MS. CABRERA: Yes.

3 REDIRECT EXAMINATION

4 BY MS. CABRERA:

5 Q Mr. Torres, did you ever receive any write-ups about --  
6 withdraw that. Have you ever received any written discipline?

7 A No.

8 Q Mr. Torres, after you were fired did anyone from Imperial  
9 Sales ever call you to tell you that work picked up and you  
10 could come back to work again?

11 MR. ZABELL: Objection. He didn't testify that he was  
12 fired. He testified that he was sent home for awhile.

13 JUDGE DAVIS: Overruled. You can answer.

14 THE WITNESS: Never.

15 BY MS. CABRERA:

16 Q Can you tell us what the word temporary means to you?

17 MR. ZABELL: Objection. The witness already testified  
18 that he doesn't know what it means.

19 MS. CABRERA: I don't think he did.

20 JUDGE DAVIS: Overruled. Let's get the answer from the  
21 witness.

22 THE WITNESS: When they hire you temporarily it means that  
23 you don't know until when.

24 BY MS. CABRERA:

25 Q When you spoke to Mr. Miller about your brother going to

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



1 terminated?

2 JUDGE DAVIS: Rephrase the question, please.

3 MR. ZABELL: After you were terminated -- after your  
4 employment came to an end at Imperial, when you were told that  
5 there wasn't enough work, don't you only believe there was work  
6 at that time, because other employees told you there was work?

7 THE WITNESS: Yes, that there was work.

8 CONTINUED RECROSS EXAMINATION

9 BY MR. ZABELL:

10 Q Who were the other employees that told you there was work?

11 A I saw at the end of the day, when we were fired, that  
12 there was orders coming in. And then later on I find out that  
13 they hired other employees.

14 Q You mean Mr. Flores, who they rehired, correct?

15 A He came back and then later on they hired other people.

16 Q Who were the other people that they hired?

17 A They got two or three more people. I don't know who they  
18 are, but they did.

19 Q Is that at the facility in Syosset or the facility in  
20 Oyster Bay? In Bethpage, excuse me.

21 A In Oyster Bay they hired Juan and then one more person.  
22 And then more. I don't know who.

23 Q Now, didn't you testify that you don't speak -- you don't  
24 read Spanish so well?

25 MS. CABRERA: Objection. That's not what he said.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1		<u>I N D E X</u>				
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR</u> <u>DIRE</u>
3	Tony Bindra	474				
4		556				
5	Marvin Hernandez	485	500	550	551	
6						

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

1 Q Were you in the meeting with Tony Bindra by yourself?

2 A No.

3 Q Who else was with you?

4 A All the employees.

5 Q Now, do you know an employee named Mena?

6 MR. ZABELL: Objection. Leading.

7 JUDGE DAVIS: Overruled.

8 Q Do you know? I'm not sure.

9 JUDGE DAVIS: He said yes.

10 MR. POWELL: This is 2(a).

11 JUDGE DAVIS: Two, thank you.

12 BY MR. POWELL:

13 Q I'm showing you a document that's been marked as General

14 Counsel Exhibit 2(a). Do you know what this document is?

15 A Yes.

16 Q What is it?

17 A It is a document. It is a paper that tells us about the  
18 rules of Imperial Sales.

19 Q Okay. And who gave you this document?

20 A Mena.

21 Q And when she gave it to you what, if anything, did she  
22 say?

23 A That we had to sign the paper if we were in agreement.

24 Q Okay. And what, if anything, did you say to her in  
25 response to that?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 A That I wasn't going to sign it.
- 2 Q What did she say, if anything?
- 3 A She didn't say anything. She only called for Miller.
- 4 Q And were you present when Herb Miller came?
- 5 A Yes.
- 6 Q And what, if anything, was said by Mr. Miller?
- 7 A That he didn't care whether we signed it or not, but that
- 8 we should sign it.
- 9 Q Did you sign it?
- 10 A No.
- 11 Q When was your last day of work?
- 12 A My last day of work, Monday, 21<sup>st</sup> of July, 2015.
- 13 Q And what happened at the end of the day?
- 14 A Tony Bindra paid us. And he said that you don't have work
- 15 anymore. That was the last day of work.
- 16 Q Now, does Mr. Bindra speak Spanish?
- 17 A No.
- 18 Q So when he said this, what language was he saying it in?
- 19 A In English.
- 20 Q Okay. Was anybody translating for him?
- 21 A No.
- 22 Q Okay. So how did you understand what he said?
- 23 MR. ZABELL: Objection to the form.
- 24 JUDGE DAVIS: Overruled. Answer.
- 25 INTERPRETER: He said, yes, Your Honor.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 by has problems. I never heard it any problems.
- 2 Q Never heard of problems at your facility?
- 3 MR. ZABELL: Objection. Asked and answered.
- 4 JUDGE DAVIS: Was your answer?
- 5 THE WITNESS: No, we never had any problems.
- 6 Q Right. And that's why you have no records of any
- 7 disciplinary action being taken against any employee, correct?
- 8 MR. ZABELL: Objection.
- 9 JUDGE DAVIS: Overruled.
- 10 Q Right? Now, you testified that Respondent moved facilities
- 11 in and around June, correct? In 2015?
- 12 A Correct.
- 13 Q The facility at 999 South Oyster Bay Road, Bethpage is a
- 14 much bigger facility, correct?
- 15 A Better?
- 16 JUDGE DAVIS: Bigger.
- 17 Q Bigger.
- 18 A Bigger, yes.
- 19 Q About 16,000 square feet, right?
- 20 A Say one more time?
- 21 Q It's about 16,000 square feet, correct?
- 22 A 16,000 square?
- 23 Q Mm mmm.
- 24 A I don't know exact square footage, but it's bigger.
- 25 Q You purchased some new machinery, correct? When you

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

1 (Whereupon, a brief recess was taken)

2 BY MS. CABRERA:

3 Q Mr. Bindra, you were served with a suit under the Fair  
4 Labor Standards Act on or about July 8<sup>th</sup>, correct?

5 A Correct.

6 JUDGE DAVIS: Year?

7 MS. CABRERA: Of 2015.

8 Q And that document --

9 MS. CABRERA: Can the witness be shown, it's already  
10 in evidence. It's GC-7. Can he be shown GC-7?

11 Q Okay. And that's GC-7. Correct, Mr. Bindra?

12 JUDGE DAVIS: He has GC-7 in front of him.

13 MS. CABRERA: Okay.

14 Q GC-7 is the suit under the Fair Labor Standards Act that  
15 you were served with on or about July 8<sup>th</sup>, 2015. Correct?

16 A Correct.

17 Q Now, when you got this you were upset, right?

18 A No. I was not upset.

19 Q You weren't upset?

20 A I was not upset.

21 Q But it was your position that your employees don't work  
22 overtime at your facility, correct?

23 A I was disappointed.

24 Q Disappointed.

25 A Yes.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660



		<u>I N D E X</u>				
	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
1						
2						
3						
4						
5	Jose Wilfredo	819	834	878	881	--
6	Argueta			879		
7						
8	Roberto Reyes	889	906	--	--	--
9						
10	Jose Wilfredo	963	966	--	--	--
11	Argueta					
12						
13	Wester Fabres	994	--	--	--	--
14						

BURKE COURT REPORTING, LLC  
 1044 Route 23 North, Suite 206  
 Wayne, New Jersey 07470  
 (973) 692-0660

1 witnesses. But if they are, I would just ask to remind the  
2 court of the sequestration order.

3 JUDGE DAVIS: You're talking about the people here for the  
4 Respondent?

5 MS. CABRERA: Yeah.

6 MR. ZABELL: Mr. Bindra has already testified.

7 MS. CABRERA: But I don't know is --

8 MR. ZABELL: If he's going to testify again?

9 MS. CABRERA: His brother going to?

10 JUDGE DAVIS: The witness' name again, please?

11 THE WITNESS: Jose Wilfredo Argueta.

12 (Pause.)

13 JUDGE DAVIS: Do you want to go ahead without Mr. Powell?

14 MS. CABRERA: Sure.

15 DIRECT EXAMINATION

16 BY MS. CABRERA:

17 Q Mr. Argueta, do you have a nickname?

18 A Yes.

19 Q And what is it?

20 A Alex.

21 Q Do you know a company by the name of Deep Distributors of  
22 Greater New York, Inc., doing business as Imperial Sales?

23 THE INTERPRETER: Would you repeat the question, please,  
24 ma'am?

25 BY MS. CABRERA:

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 Q Do you know a copy by the name of Deep Distributors of  
2 Greater New York doing business as Imperial Sales?

3 A Yes.

4 Q How do you know them?

5 A Through Marvin Hernandez (ph.)?

6 Q And who is Marvin Hernandez?

7 A Marvin was another worker that worked there.

8 Q What did he tell you about this company?

9 A He said that they needed a worker and he told me to go,  
10 that they were going to give work.

11 Q And did you go?

12 A Yes.

13 Q Did you get the job?

14 A Yes.

15 Q When did you start?

16 A I started 2011.

17 Q Do you recall what month?

18 A I believe it was October.

19 Q Did you have to interview with anybody?

20 JUDGE DAVIS: What year did you start?

21 THE WITNESS: 2011.

22 BY MS. CABRERA:

23 Q Did you have to interview with anybody?

24 A No.

25 Q Who gave you the job?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 JUDGE DAVIS: Overruled.  
2 BY MS. CABRERA:  
3 Q You can answer.  
4 A Oh, yes.  
5 Q How do you know that union?  
6 A I became aware through Hermie Hernandez (ph.).  
7 Q And who is Hermie Hernandez?  
8 A Hermie Hernandez came to work there. He talked to us  
9 about the union.  
10 Q Do you know whether or not the union held any meetings  
11 with employees?  
12 A Yes.  
13 Q Did you attend any of these meetings?  
14 A Yes.  
15 Q When was the first meeting that you attended?  
16 A That was around mid-February.  
17 Q Where did the meeting take place?  
18 A 2014.  
19 Q Are you sure it was 2014?  
20 MR. ZABELL: Objection.  
21 JUDGE DAVIS: Overruled.  
22 THE WITNESS: One second, one second, no, no. Let me  
23 think. No, it was in 2015.  
24 BY MS. CABRERA:  
25 Q Where did that meeting take place?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 JUDGE DAVIS: Overruled.  
2 THE WITNESS: No.  
3 BY MS. CABRERA:  
4 Q Calling your attention to mid-February of 2015, did any --  
5 did you have a conversation with Mr. Malik about the union?  
6 MR. ZABELL: Objection.  
7 JUDGE DAVIS: Overruled.  
8 THE WITNESS: Oh, yes.  
9 MR. ZABELL: Objection, move to strike, it's leading.  
10 JUDGE DAVIS: Motion denied.  
11 BY MS. CABRERA:  
12 Q And where were you?  
13 MR. ZABELL: Objection to the form.  
14 JUDGE DAVIS: Overruled.  
15 THE WITNESS: I was in the area of the product by the name  
16 of Helen (ph.).  
17 BY MS. CABRERA:  
18 Q Were you alone?  
19 A No, with Mitchell Torres (ph.).  
20 Q How did the conversation with Mr. Malik begin?  
21 A No, he said we were of the union.  
22 Q Did you respond?  
23 A No.  
24 Q Did he say anything else to you?  
25 A No.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 Q What language was Mr. Malik speaking in?
- 2 A Spanish.
- 3 Q Have you ever received written discipline?
- 4 A No.
- 5 Q What about a verbal discipline?
- 6 A Yes, one time, Malik.
- 7 Q When was that?
- 8 A That was also in 2014.
- 9 Q Do you recall the month?
- 10 A September, I think.
- 11 Q What did you receive a verbal discipline for?
- 12 A I was filling the pick with product and he spoke to me to
- 13 go to do another job, but I didn't heard him, so he said that
- 14 that was the last chance he was giving.
- 15 Q Did he fire you then?
- 16 A No, never.
- 17 Q Did he suspend you?
- 18 A No.
- 19 Q And did he give you anything in writing in connection with
- 20 this incident?
- 21 A No.
- 22 Q Mr. Argueta, were you ever involved in an accident while
- 23 on the job?
- 24 A Yes.
- 25 Q when was this?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



1 A Tony.

2 Q Did Mr. Bindra ever issue you a written discipline for  
3 climbing the shelves?

4 A No.

5 Q When would you say was the first time you climbed the  
6 shelves?

7 A I did it many times. I couldn't tell you how many because  
8 that was part of the job to bring products up and down.

9 JUDGE DAVIS: She's asking when the first time was, if you  
10 remember.

11 THE WITNESS: No, I don't remember.

12 BY MS. CABRERA:

13 Q When was your last day of employment?

14 THE INTERPRETER: Last day?

15 MS. CABRERA: Um-hum.

16 THE WITNESS: It was 6th of March, of 2015.

17 BY MS. CABRERA:

18 Q Did you have a discussion with any member of management  
19 about the fact that it was your last day?

20 MR. ZABELL: Objection.

21 JUDGE DAVIS: Overruled.

22 THE WITNESS: Yes.

23 BY MS. CABRERA:

24 Q Who did you talk to?

25 A With Miller.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 Q What time of day was it?
- 2 A It was the time, leaving time, exiting time.
- 3 Q Was it the beginning of your shift or the end of your
- 4 shift?
- 5 A No, at the end.
- 6 Q Where did the conversation take place?
- 7 A In front of the company where the offices are.
- 8 Q Were you alone?
- 9 A No. We all were leaving.
- 10 Q Who is we all?
- 11 A Everybody, Marvin, Henry, Augustin, Corlan (ph.), Olman
- 12 (ph.), Seldin (ph.), everybody that worked there.
- 13 Q What did Mr. Miller say to you?
- 14 A Marvin told me, Mitchell and Marvin, to wait for a second,
- 15 to Mitchel and Marvin -- me, Mitchell, and Marvin to wait for a
- 16 second.
- 17 Q I'm sorry and who said that?
- 18 A Miller.
- 19 Q What did he say to you?
- 20 A He said that Tony had called him and that was the last day
- 21 of work for us.
- 22 Q Did he say why?
- 23 A Because he said that work was light, that there wasn't
- 24 enough work for us.
- 25 Q Was work light at that time?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 A No.

2 Q And why do you say that?

3 A Because all the times I seen, every day I unloaded four,  
4 five trucks, and also the show they had.

5 Q What show did they have?

6 A It's a show they do. They show the products that they  
7 sell.

8 Q What does that have to do with the amount of work that was  
9 available?

10 A Because when they do the shows, the clients, they request  
11 a lot of products, a lot of products, and there is a lot of  
12 orders, and that's when there is a lot of work.

13 MS. CABRERA: I have nothing further, Your Honor.

14 JUDGE DAVIS: Mr. Zabell?

15 MR. ZABELL: Judge, at this time, I'm going to make a  
16 request for any affidavits that this individual has submitted.

17 MS. CABRERA: I have one. Oh, here.

18 MR. ZABELL: Thank you. May I have a few minutes to  
19 review them, Judge?

20 JUDGE DAVIS: Five minutes, ten minutes?

21 MR. ZABELL: I'm thinking along the lines of 10 to 15,  
22 Judge.

23 JUDGE DAVIS: Okay, we'll come back at 11:45. Don't  
24 discuss your testimony with anyone during the break.

25 (Recess from 11:37 a.m. to 11:50 a.m.)

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 JUDGE DAVIS: Okay, thank you.

2 MR. POWELL: I'm going to ask a preliminary question, Your  
3 Honor, if that's okay.

4 BY MR. POWELL:

5 Q Mr. Reyes, did you ever -- did anyone from management of  
6 the company ever talk with you about Local 660?

7 A From the company?

8 Q Yes.

9 A Herb Miller talked to me about.

10 Q And Mr. Miller, when he talked to you about the union,  
11 what did he say?

12 A He told me if I knew something about the union.

13 Q Do you recall when that was?

14 A I don't remember the exact date, but it was in December.

15 Q Was it after you had been meeting with Mr. Fabres?

16 MR. ZABELL: Objection, leading.

17 JUDGE DAVIS: Overruled.

18 THE WITNESS: Yes.

19 BY MR. POWELL:

20 Q What, if anything, was your response when he asked if you  
21 knew anything about the union?

22 A I told them that I knew nothing.

23 Q Did he say anything to that?

24 A Yes.

25 Q What did he say?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 A He said I think that the one that is hanging out with the  
2 union is Alex.
- 3 Q And who is Alex?
- 4 A Another co-worker.
- 5 Q Do you know his last name?
- 6 A I don't.
- 7 Q Was there only one Alex working there, at the time?
- 8 MR. ZABELL: Objection.
- 9 JUDGE DAVIS: Overruled.
- 10 THE WITNESS: Yes.
- 11 BY MR. POWELL:
- 12 Q Now there was an election at the facility as you testified  
13 to, correct?
- 14 A Yes.
- 15 Q And you participated in that election?
- 16 A Yes.
- 17 Q After the election, do you know did the union still meet  
18 with the employees?
- 19 A Yes.
- 20 Q Did you attend any of those meetings?
- 21 A Yes.
- 22 Q Do you remember any of the union's -- any of these  
23 meetings in particular?
- 24 A Yes.
- 25 Q Which one?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 A Wester came and he introduced us to a lawyer that was  
2 going to handle a case that because they didn't pay us  
3 overtime. That's what it was.

4 Q Did you actually meet with this lawyer?

5 A Yes.

6 Q Do you know what, if anything, came out of this meeting  
7 with the lawyer?

8 A Yes.

9 Q What was that?

10 A After we met the lawyer, some papers arrived at the  
11 company. They were court papers, I think. And they stated  
12 that they didn't pay us overtime.

13 Q How do you know that these papers arrived at the company?

14 A Because Tony Bindra and Herb Miller called me to the  
15 office of Miller and showed me the paper.

16 Q Were you by yourself?

17 A Only the two of them.

18 Q Was any other employee with you?

19 A Alone.

20 Q What did they say to you about these papers?

21 JUDGE DAVIS: First of all, who is speaking?

22 MR. POWELL: I was -- all right, let me rephrase that.

23 JUDGE DAVIS: Okay.

24 BY MR. POWELL:

25 Q The meeting started. Tony Bindra, does he speak Spanish?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 A No.
- 2 Q Did he speak to you during this meeting?
- 3 A Yes.
- 4 Q How did he communicate to you?
- 5 A Through Herb Miller.
- 6 Q Herb Miller was acting as a translator?
- 7 MR. ZABELL: Objection, leading.
- 8 THE WITNESS: Yes.
- 9 JUDGE DAVIS: Overruled.
- 10 BY MR. POWELL:
- 11 Q What did Mr. Bindra say to you regarding the paper?
- 12 A He said if I knew about the offices -- about the lawyer's
- 13 office.
- 14 Q What lawyer?
- 15 A The lawyer from the overtime.
- 16 Q Why did he ask you if you knew about the offices of the
- 17 lawyer for the overtime?
- 18 MR. ZABELL: Objection.
- 19 JUDGE DAVIS: Sustained.
- 20 BY MR. POWELL:
- 21 Q What did you say, if anything?
- 22 A That I knew nothing.
- 23 Q Did he say anything after you responded that you knew
- 24 nothing?
- 25 A He said but your name is the first one here on the list.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



- 1 Q Did you see the list? Did you see the paper?
- 2 A Yes.
- 3 Q Did he show it to you?
- 4 A Yes.
- 5 Q What did you say after he asked you if your name was the
- 6 first one on the list?
- 7 A I told him we know nothing.
- 8 Q Did he accept that?
- 9 MR. ZABELL: Objection.
- 10 JUDGE DAVIS: What did he say?
- 11 THE WITNESS: Okay, that's okay, you can go back to work,
- 12 we're going to meet with employees one by one.
- 13 BY MR. POWELL:
- 14 Q What did you do then?
- 15 A I went back to work.
- 16 Q This meeting with Mr. Bindra, do you recall when that took
- 17 place?
- 18 A I don't remember the date exactly, but it was about a week
- 19 before the firing.
- 20 Q Was this the only meeting you had with Mr. Bindra about
- 21 the paper?
- 22 A After that meeting, when he said that he was going to call
- 23 each employee one by one, he didn't do it. He called everyone
- 24 all at once and show us the paper.
- 25 Q Did you attend that meeting as well?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 A Yes.

2 Q What happened at this meeting?

3 A He showed us the paper and he wanted to know about the

4 office of the lawyer.

5 Q What if anything -- did he say how he was going to proceed

6 with this?

7 MR. ZABELL: Objection to the form.

8 JUDGE DAVIS: Overruled.

9 THE WITNESS: He said that we were suing him because he

10 didn't pay overtime.

11 BY MR. POWELL:

12 Q Did he say anything else?

13 A Then he read aloud the names of the, all the employees on

14 the list.

15 Q Did he say anything after that?

16 A He only said that he was going to defend himself.

17 Q You said you were terminated on July 21, 2015, correct?

18 MR. ZABELL: Objection.

19 MR. POWELL: Just re-grounding, Your Honor.

20 JUDGE DAVIS: July 21, 2015, we have that in the record.

21 THE WITNESS: That's right.

22 BY MR. POWELL:

23 Q What time did you report to work that day, in the morning?

24 A At 8:00.

25 Q Is that your usual start time?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 A Yes.

2 Q What happened that day?

3 A The day of the firing?

4 Q Yes.

5 A That day, at three o'clock, the secretary, I don't know  
6 whether it is the secretary, it's a girl by the name of Mena  
7 (ph.), the one who paid us, she took some papers and the papers  
8 stated that we couldn't use the cellulars.

9 JUDGE DAVIS: Stated what?

10 THE INTERPRETER: That we couldn't use the cellulars.

11 BY MR. POWELL:

12 Q Did it say anything else?

13 A It also said that if we get there late, about five minutes  
14 late, we could be sent up back home or we could be given a  
15 warning.

16 Q What if anything -- did you speak to Mena about this  
17 paper?

18 A No. I only read it and she asked me if I was going to  
19 sign it. I said no. And that was it.

20 Q She didn't follow-up on any other -- she did not state  
21 anything more?

22 MR. ZABELL: Objection.

23 JUDGE DAVIS: What else did she say, if anything?

24 THE WITNESS: No, she didn't say anything else.

25 BY MR. POWELL:

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 Q Did anyone -- at that time, did you speak to anyone else  
2 from management?

3 MR. ZABELL: Objection.

4 JUDGE DAVIS: Objection?

5 MR. ZABELL: I'm objecting.

6 JUDGE DAVIS: To the management part of it?

7 MR. ZABELL: And leading as well.

8 MR. POWELL: Let me rephrase, Your Honor.

9 JUDGE DAVIS: Yeah, okay.

10 BY MR. POWELL:

11 Q Was Mena the only person you spoke to about that paper,  
12 that day?

13 A Yes.

14 Q Did anyone tell you that you could be terminated for not  
15 signing that paper?

16 MR. ZABELL: Objection.

17 JUDGE DAVIS: Overruled.

18 THE WITNESS: No.

19 MR. POWELL: Excuse me, repeat the answer?

20 THE INTERPRETER: No.

21 BY MR. POWELL:

22 Q Now what happened later on that day?

23 A That day, later on, at around five o'clock, when I was  
24 leaving work, they called me.

25 Q Who is they?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 A Herb Miller and Danny, no, Tony Bindra.
- 2 Q Once again, what if any -- were you by yourself?
- 3 A At the office or --
- 4 Q Yes.
- 5 A No.
- 6 Q When you met with them, were there any other employees
- 7 with you?
- 8 A No.
- 9 Q When you met with them, what if any was said?
- 10 A The day of the firing?
- 11 Q Yes.
- 12 JUDGE DAVIS: In the afternoon.
- 13 BY MR. POWELL:
- 14 Q In the afternoon.
- 15 A Tony Bindra came. He gave me an envelope and a paper to
- 16 sign.
- 17 Q What was this paper that he gave you to sign?
- 18 A That paper was the one whenever they paid us, gave us the
- 19 check, we had to sign that paper.
- 20 Q Was it the same paper that Mena had given you?
- 21 A Yes.
- 22 Q It was the same paper with the rules?
- 23 A No, that paper is only for payment.
- 24 Q What if anything did they say to you at that time when
- 25 they gave you the paper?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 A Tony Bindra only said to sign it, and he gave me the check  
2 and the envelope.  
3 Q Did he say anything?  
4 A No. He only said to sign it and that's it.  
5 Q Did Mr. Miller say anything?  
6 A No.  
7 Q And you were terminated, at this time?  
8 MR. ZABELL: Objection.  
9 JUDGE DAVIS: Overruled.  
10 THE WITNESS: Yes.  
11 BY MR. POWELL:  
12 Q How did you know you were terminated?  
13 A Because they were paying me the last days of the week.  
14 Q And was that unusual?  
15 A I didn't understand the question.  
16 Q Did they always pay you up until the last day of the week  
17 that you worked?  
18 A No. Whenever they paid us, two days were left out for the  
19 next week.  
20 Q All right. When you were terminated, which -- let me  
21 rephrase, I'm sorry. During your time working for the company,  
22 they moved locations, is that right?  
23 MR. ZABELL: Objection.  
24 JUDGE DAVIS: Overruled.  
25 THE WITNESS: Yes.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 BY MR. POWELL:

2 Q Do you recall when they moved locations?

3 A It was between May and June.

4 Q So how long had you been working at the new facility?

5 JUDGE DAVIS: At the time that you were fired?

6 BY MR. POWELL:

7 Q At the time you were fired.

8 A About five weeks.

9 Q Now, Mr. Reyes, did anyone ever tell you that if you  
10 signed the paper regarding the rules, you could come back to  
11 work?

12 MR. ZABELL: Objection.

13 JUDGE DAVIS: Overruled.

14 MR. ZABELL: I'm sorry, Your Honor, he said if you sign  
15 the paper regarding the move, you can come back --

16 MR. POWELL: No, I said the rules.

17 MR. ZABELL: Oh, I'm sorry.

18 THE WITNESS: No.

19 MR. POWELL: I have nothing further, Your Honor.

20 JUDGE DAVIS: Mr. Zabell?

21 MR. ZABELL: Judge, at this time, I'm making a request for  
22 any affidavit that this individual has submitted and I'd like  
23 some time to review that affidavit or affidavits, plural.

24 JUDGE DAVIS: How many English ones do you have there?

25 MR. POWELL: I have two English.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



1 JUDGE DAVIS: It's 2:39. Come back at 2:50. Off the  
2 record. Don't discuss your testimony with anyone during the  
3 break.

4 (Recess from 2:42 p.m. to 2:58 p.m.)

5 JUDGE DAVIS: Back on the record.

6 Mr. Zabell?

7 MR. ZABELL: Thanks, Judge.

8 CROSS-EXAMINATION

9 BY MR. ZABELL:

10 Q Mr. Reyes, did you testify that your name was Roberto  
11 Reyes?

12 A Jose Roberto Reyes.

13 Q Has it always been Jose Roberto Reyes?

14 MR. POWELL: Objection, Your Honor.

15 JUDGE DAVIS: Overruled.

16 THE WITNESS: My name has always been like that.

17 BY MR. ZABELL:

18 Q Do you live at 77 Railroad Street, in Huntington Station?

19 MR. POWELL: Objection, Your Honor.

20 JUDGE DAVIS: Overruled.

21 BY MR. ZABELL:

22 Q Station, New York --

23 MR. ZABELL: Your Honor, what --

24 JUDGE DAVIS: Let's get an answer to the question.

25 THE WITNESS: Yes.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 you want to be heard on that or do you want to just go into the  
2 questions?

3 MS. CABRERA: I'm going to question the witness.

4 JUDGE DAVIS: Mr. Argueta, state your name, please, again.

5 THE WITNESS: Jose Wilfredo Argueta.

6 JUDGE DAVIS: You testified here today, is that correct?

7 THE WITNESS: Yes.

8 JUDGE DAVIS: You understand that you are still under  
9 oath?

10 THE WITNESS: Yes.

11 (Whereupon,

12 JOSE WILFREDO ARGUETA,

13 was recalled as a witness by and on behalf of the General  
14 Counsel and, after having been previously duly sworn through  
15 the interpreter, was examined and testified as follows:)

16 DIRECT EXAMINATION

17 BY MS. CABRERA:

18 Q Mr. Argueta, did you attend the trial on the first day,  
19 December 9, 2015?

20 MR. ZABELL: Objection, leading.

21 JUDGE DAVIS: Overruled.

22 THE WITNESS: Yes.

23 BY MS. CABRERA:

24 Q On that date, did you hear Mr. Zabell, the attorney for  
25 Respondents, make any comments about immigration?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 MR. ZABELL: Objection, leading.  
2 JUDGE DAVIS: Overruled.  
3 THE WITNESS: Yes.  
4 BY MS. CABRERA:  
5 Q Where were you?  
6 A At the elevator.  
7 Q Were you alone?  
8 A No, with Mitchell.  
9 Q Where was Mr. Zabell?  
10 A He was arriving, at that time.  
11 Q What were you doing?  
12 A We were just waiting to be called, to be brought here.  
13 Q How close was Mr. Zabell to you?  
14 A Three, four meters.  
15 Q What did you hear him say?  
16 A He said that he was going to report us to immigration, and  
17 then here he said it again, and there was an argument. He said  
18 that he wasn't going to pay us not even a penny.  
19 Q Where were you when you heard that comment about not being  
20 paid a penny?  
21 A We were right there, sitting over there.  
22 JUDGE DAVIS: Pointing to General Counsel's table, in the  
23 hearing room.  
24 BY MS. CABRERA:  
25 Q So you were in the hearing room?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 MR. ZABELL: No, no, no, objection, that's leading. He  
2 testified that he was right there, in Hearing Room 2, at  
3 General Counsel's -- at counsel for the General Counsel's  
4 table.

5 MS. CABRERA: He pointed in the direction --

6 JUDGE DAVIS: Mr. Argueta, get up and tell us where you  
7 were.

8 THE WITNESS: We were right there.

9 JUDGE DAVIS: Sir --

10 THE WITNESS: Over here. Here.

11 JUDGE DAVIS: The witness walked to the front row, past  
12 the counsel bar and the audience section, on the right-hand  
13 side, behind General Counsel's table. Come back.

14 MR. ZABELL: Judge, can you take judicial notice that we  
15 are in Hearing Room Number 2.

16 JUDGE DAVIS: Right.

17 BY MS. CABRERA:

18 Q Mr. Argueta, who were you with?

19 A With Roberto, with Mitchell, with Augustin, with Javier,  
20 Marvin.

21 Q Was anyone -- any representative of the union present?

22 A Yes, Mr. Powell.

23 Q By Mr. Powell, you mean from the Labor Board, the attorney  
24 for the Labor Board?

25 A Yes, Mr. Powell.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 Q What did you hear Mr. Zabell say?

2 MR. ZABELL: Objection, asked and answered.

3 JUDGE DAVIS: We'll get it again, overruled.

4 THE WITNESS: That he was going to report us to  
5 immigration and that he wasn't going to pay a penny.

6 BY MS. CABRERA:

7 Q Did you hear Mr. Powell say anything?

8 A Yes. He told him three times, stop, stop, not to say that  
9 anymore.

10 MS. CABRERA: I have nothing further, Your Honor.

11 MR. ZABELL: Your Honor, I have a fair amount now.

12 CROSS-EXAMINATION

13 BY MR. ZABELL:

14 Q Mr. Argueta, you are testifying with the assistance of an  
15 interpreter, are you not?

16 A Yes.

17 Q And that's because you do not fully understand English,  
18 correct?

19 A I said that I understand a little.

20 Q You do not fully understand English, correct?

21 MS. CABRERA: Objection. And I would ask that Mr. Zabell  
22 not yell at the witness. He is again trying to intimidate the  
23 witness.

24 JUDGE DAVIS: Speak low, please.

25 MS. CABRERA: And it was already asked and answered.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 Q Is it your testimony that we were in this very room the  
2 first day of testimony?

3 A Yes.

4 Q And when you testified that I said -- that I remarked  
5 again about immigration status in court, was the Judge present  
6 at the time?

7 A Yes. Mr. Powell was here, as well.

8 Q So the Judge was here and Mr. Howell was here, correct --  
9 Powell, I'm sorry.

10 A Yes, they were here.

11 Q So what I said, I said in front of the Judge, correct?

12 A And of Powell.

13 Q And I had remarked that based upon immigration status, we  
14 did not believe we had to pay anybody anything, correct?

15 A He said -- I mean you said you were not going to pay us,  
16 not even a penny.

17 Q And did I say I was not going to pay you not even a penny  
18 based upon your immigration status?

19 A Yes, yes.

20 Q Do you know if that's against the law to say that?

21 MS. CABRERA: Objection.

22 JUDGE DAVIS: Sustained.

23 BY MR. ZABELL:

24 Q Did counsel for the General Counsel explain to you that  
25 based upon immigration status --

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 they heard this?

2 MR. ZABELL: Objection.

3 JUDGE DAVIS: Did they say anything to you, when they  
4 heard that?

5 THE WITNESS: When they heard, when Mr. Zabell was  
6 yelling, they turn, they had to over to the door, and they  
7 looking -- they looking at me. And I told them to, you know,  
8 they were asking me like what happened because they are jolly.  
9 So I told them to calm down. And I say Mr. Zabell make a  
10 comment about immigration. And I tried to calm down the  
11 employees.

12 BY MR. POWELL:

13 Q Was this the only other time you heard Mr. Zabell yell  
14 that morning?

15 MR. ZABELL: Objection.

16 JUDGE DAVIS: This is the only other time?

17 MR. POWELL: I mean, I'm sorry.

18 BY MR. POWELL:

19 Q Was this the only time you heard Mr. Zabell yell that  
20 morning?

21 A No.

22 Q Could you tell me about the second time you heard  
23 Mr. Zabell yell.

24 A A while later, I was sitting in the courtroom, and I saw  
25 Mr. Henry Powell, he came into the courtroom. He walked up to

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660



1 Mr. Zabell. Mr. Zabell was sitting in front of the court, with  
2 a table in front of the court.

3 Q Where were the employees?

4 A They were sitting in the bench.

5 Q Were they in the courtroom, itself?

6 A In the courtroom, yeah.

7 Q And what happened?

8 A Mr. Henry, he came into the room. He walk up to Mr.  
9 Zabell and they were -- they start talking, but I can't hear  
10 what they were talking because they talking quietly. And then  
11 Mr. Zabell, he raised his voice. And I heard when Mr. Zabell  
12 say if they, you know, if they going to -- if they going on the  
13 stand, they're going to commit a perjury, and he going to  
14 report to immigration.

15 Q Did he say anything else?

16 A And also he mentioned something about the Supreme Court  
17 and he pointed the Imperial's employees, he pointing, and he  
18 say they won't receive a penny.

19 Q What if anything was my reaction?

20 A I saw --

21 MR. ZABELL: Objection.

22 JUDGE DAVIS: You asked what your reaction was.

23 MR. POWELL: Yeah.

24 JUDGE DAVIS: Overruled.

25 THE WITNESS: All right. Mr. Henry, I heard what he say

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

## I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Wester Fabres	--	1008	1064 1066		
Javier Reyes	1068	1088	1151	1156	

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

1 A. Um-hum.

2 Q. We need words.

3 JUDGE DAVIS: Answer yes or no.

4 THE WITNESS: Yes.

5 BY MR. ZABELL:

6 Q. Did you ever tell any of the employees of Imperial Sales  
7 that the Union won the election?

8 A. Say again? I don't understand the question.

9 Q. Did you ever tell any of the employees of Imperial Sales  
10 that the Union won the election?

11 A. I don't remember.

12 Q. Do you know if the Union did win the election?

13 A. Yes. Yes, we won the election.

14 Q. And how do you know the Union won the election?

15 A. Because I was there the day of the election.

16 Q. Do you know why in your affidavit you indicated and I  
17 quote, Paragraph 1, "I am employed by Local 660 as an organizer  
18 and business agent. I am familiar with Imperial Sales because  
19 the Union is currently trying to organized the warehouse workers  
20 of Imperial Sales."

21 Do you recall signing an affidavit that said that?

22 A. Um-hum.

23 JUDGE DAVIS: Answer?

24 THE WITNESS: Yes.

25 BY MR. ZABELL:

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

1 A. Because he always followed the employees, he always  
2 observed them and he was always at the computer and he was  
3 always giving orders.

4 Q. What computer was he always at?

5 A. In his office.

6 Q. Does Herb Miller have an office?

7 A. Yes.

8 Q. Does anyone else have an office?

9 A. Only the two of them.

10 JUDGE DAVIS: Two of who?

11 THE WITNESS: Herb Miller and Mr. Monik.

12 BY MS. CABRERA:

13 Q. When you were hired, Mr. Reyes, were you given an employee  
14 handbook?

15 A. No.

16 Q. When you were hired were you given a list of work rules?

17 A. No.

18 Q. When you started did anybody tell you there were work rules  
19 regarding cell phone use?

20 A. No.

21 Q. Did anybody tell you there were rules regarding lateness?

22 A. No.

23 Q. Did you ever use your cell phone while at work?

24 A. Yes.

25 Q. Do you know if Mr. Miller ever saw you?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 A. Yes.
- 2 Q. How do you know he saw you?
- 3 A. We were unloading product outside and sometimes I would get
- 4 a call and he saw me.
- 5 Q. Did you ever receive any discipline from Mr. Miller for
- 6 using your cell phone while at work?
- 7 A. No.
- 8 Q. Were you ever late to work?
- 9 A. Yes, about three times.
- 10 Q. Do you recall when?
- 11 A. I don't remember.
- 12 Q. Do you recall whether or not you were ever disciplined for
- 13 being late on those three occasions?
- 14 A. No.
- 15 Q. Do you know a Union by the name of Local 660?
- 16 A. Yes.
- 17 Q. And how do you know them?
- 18 A. Can you repeat that question, please?
- 19 Q. Sure. How do you know the Union, Local 660?
- 20 A. They instructed us to know our rights.
- 21 Q. Did you ever attend a meeting with Local 660?
- 22 MR. ZABELL: Objection, leading.
- 23 JUDGE DAVIS: Overruled.
- 24 THE WITNESS: Yes.
- 25 BY MS. CABRERA:

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

1 Q. And when was the first time you attended a meeting with  
2 Local 660?

3 MR. ZABELL: Objection.

4 JUDGE DAVIS: Overruled.

5 THE WITNESS: About December 2014.

6 BY MS. CABRERA:

7 Q. And roughly how many meetings did you attend?

8 A. About six, seven.

9 Q. Did you sign anything at these meetings?

10 MR. ZABELL: Objection.

11 JUDGE DAVIS: Overruled.

12 THE WITNESS: Yes.

13 BY MS. CABRERA:

14 Q. And what did you sign?

15 A. That I was in agreement with the Union.

16 Q. Do you know a Union representative by the name of Wester  
17 Fabres?

18 A. Yes.

19 Q. Do you know if he ever visited the facility in Syosset?

20 A. Yes.

21 Q. And where did you see him?

22 A. In front of the building.

23 Q. And when was the first time you saw him?

24 A. It's about February.

25 Q. And what did you see him doing?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 A. He was stopped with the car and a sign Local 660.
- 2 Q. About how far from the front of the building was he?
- 3 A. Across the street.
- 4 Q. Now, this first time that you saw him there did you stop to
- 5 talk to him?
- 6 A. Yes.
- 7 Q. Were you alone?
- 8 A. I, my Uncle Roberto and Selden.
- 9 Q. What time of day was it?
- 10 A. About ten, ten to 8:00.
- 11 Q. And how long did you stay there?
- 12 A. About five minutes.
- 13 Q. Was that the only time that you saw Mr. Fabres at the
- 14 facility?
- 15 A. No.
- 16 Q. How many more times did you see him there?
- 17 A. Standing in front of the building?
- 18 Q. Yes.
- 19 A. Three times.
- 20 Q. Did you stop to talk to him those other additional times?
- 21 A. Yes.
- 22 Q. Do you know whether or not Mr. Miller ever saw you outside
- 23 talking to Mr. Fabres?
- 24 A. Yes.
- 25 Q. And how do you know?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

1 Q. And who was in attendance for the Union?

2 A. Wester.

3 Q. Anyone else?

4 A. Just.

5 Q. And what was discussed at this meeting?

6 A. The time that we worked and all of the Sundays we have  
7 worked.

8 Q. And did the Union say what, if anything, that they were  
9 going to do about that?

10 A. Yes, that they were going to file a suit for the overtime  
11 that they hadn't paid us.

12 Q. Do you know if the Union ever did file that suit?

13 A. Yes.

14 Q. And how do you know?

15 A. One day Tony called us to a meeting, everyone who was on  
16 the list.

17 Q. What list are you referring to?

18 A. A list of all of us who had attended the meeting, a list  
19 that had all of our names with the lawyer's number and all of  
20 that, all of that.

21 Q. When you say meeting are you referring to the meeting that  
22 you described earlier that took place in May 2015 with the  
23 Union?

24 MR. ZABELL: Objection, leading.

25 JUDGE DAVIS: Rephrase the question.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660



1 BY MS. CABRERA:

2 Q. What meeting are you referring to?

3 A. When we met at the building for the overtime.

4 Q. You just testified that you took part in a meeting with  
5 Tony Bindra. When did that take place?

6 MR. ZABELL: Objection.

7 JUDGE DAVIS: Overruled.

8 THE WITNESS: It was one week before we got fired.

9 BY MS. CABRERA:

10 Q. And what date were you fired?

11 A. July 21st.

12 Q. Now, where did this meeting with Mr. Bindra take place?

13 A. On the table where we ate, the place where we had our meal.

14 Q. Did it take place at the facility?

15 A. Inside the warehouse.

16 Q. And was this when the warehouse was in Syosset or when it  
17 moved to Bethpage?

18 A. In the new one.

19 Q. Which one is that?

20 A. The new one that they called the new place. I don't know  
21 the name of it.

22 Q. Did the meeting take place in a Syosset location?

23 MR. ZABELL: Objection. He just testified he didn't know  
24 the name of the location.

25 MS. CABRERA: I'm not asking him about the new location,

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

1 I'm asking him about the old one.

2 JUDGE DAVIS: Overruled. You can answer.

3 THE WITNESS: The old place was Syosset.

4 BY MS. CABRERA:

5 Q. Right. Did the meeting with Tony Bindra take place in  
6 Syosset?

7 A. No.

8 Q. What time of day did the meeting with Mr. Bindra take  
9 place?

10 A. About 15 minutes before leaving time, before exiting time.

11 Q. Was anyone else from management present at this meeting  
12 with Mr. Bindra?

13 A. Herb Miller was with them.

14 Q. And which employees were present for this meeting?

15 A. Augustin, Roberto, Seldin, Henry, Marvin, Armando, Olman,  
16 Jiro and me.

17 Q. How did the meeting begin?

18 A. Tony had a page with all our names and he showed it to us  
19 and he put it on the table. And he said here, I have a list  
20 with all your name.

21 Q. Did he say anything else?

22 A. Yes. He said that we were suing him and if we were suing  
23 him he was going to counter sue us.

24 Q. Was Mr. Bindra speaking in English or Spanish?

25 A. In English and her translated it.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

1 Q. During this meeting did either Mr. Bindra or Mr. Miller ask  
2 you what your address was?

3 A. Yes. He said he thought there was something wrong because  
4 the addresses that appeared on the paper were wrong.

5 Q. Did he say your name during this meeting?

6 THE INTERPRETOR: Did he say your name during this  
7 meeting?

8 MS. CABRERA: Um-hum.

9 THE WITNESS: Yes.

10 BY MS. CABRERA:

11 Q. What did he say?

12 A. That my address appeared to be in Syosset, which was wrong.

13 Q. Did he ask other employees what their addresses were?

14 A. Yes.

15 Q. All the employees?

16 A. No, Selvin and Augustin both.

17 Q. How long did this meeting last?

18 A. About 15.

19 Q. 15 what?

20 A. Minutes.

21 Q. Now, you testified already that your last day was July 21st  
22 of 2015. Who told you that that was your last day of work?

23 A. Well, that was the day I was fired.

24 Q. And what happened that day?

25 A. Before we were getting paid they came with the page, with a

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

1 paper, a sealed paper and they said that we had to sign that  
2 paper. If we didn't sign that paper we were not going to get  
3 paid. And that paper had the rules for lateness in it and cell  
4 phone use.

5 Q. Who gave you that piece of paper?

6 A. The girl that used to pay.

7 Q. Do you know what her name is?

8 A. I think her name is Nenna.

9 Q. And where were you when she gave you that paper?

10 A. In the office of Mr. Malik.

11 Q. Is that the office that you go to to get paid every week?

12 MR. ZABELL: Objection, leading.

13 JUDGE DAVIS: Sustained. Sustained, you don't have to  
14 answer it. Next question.

15 BY MS. CABRERA:

16 Q. How do you receive your paycheck?

17 A. Cash.

18 Q. And who gives you the cash?

19 A. The girl that used to pay.

20 Q. And how often do you get -- did you get paid?

21 A. Every Tuesday.

22 Q. And where would you have to go to get this payment?

23 A. To the office of Mr. Malik.

24 Q. When Ms. Nenna gave you this paper to sign did you sign it?

25 MR. ZABELL: Objection.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 JUDGE DAVIS: Overruled.
- 2 THE WITNESS: No.
- 3 BY MS. CABRERA:
- 4 Q. Did she say anything to you when you didn't sign it?
- 5 A. She called Herb Miller.
- 6 Q. And what happened after she called Herb Miller?
- 7 A. He came and he said you're going to sign it. I said no.
- 8 And he said do you know how to read?
- 9 Q. And did he say anything else?
- 10 A. Only that.
- 11 Q. How long did that conversation with Mr. Miller last?
- 12 A. About a minute and a half.
- 13 Q. And what, if anything, did you do after that conversation
- 14 with Mr. Miller?
- 15 A. I went back to work.
- 16 Q. And what, if anything, happened at the end of your shift
- 17 that day?
- 18 A. When we were leaving they called us, all of us who didn't
- 19 sign to Mr. Miller's office.
- 20 Q. And did you go to Mr. Miller's office?
- 21 A. Yes.
- 22 Q. And who else was with you?
- 23 A. Tony Bindra and his brother Dennis.
- 24 Q. And what employees were present?
- 25 A. We were called each one of us by name only.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 Q. You were called to where?
- 2 A. There, to the office, to Herb Miller.
- 3 Q. So when you went into the office of Mr. Miller were you
- 4 alone?
- 5 A. Only I, Tony, and Dennis.
- 6 Q. And who spoke to you?
- 7 A. Tony.
- 8 Q. And what, if anything, did he say?
- 9 A. He only gave me the payment.
- 10 Q. Did anybody in that room say anything to you?
- 11 A. That I was fired.
- 12 Q. Who told you that you were fired?
- 13 A. Tony.
- 14 Q. What did you do after Mr. Bindra told you that?
- 15 A. I left through the door.
- 16 Q. Mr. Reyes, were you present here on the first day of trial,
- 17 December 9th, 2015?
- 18 A. December 9th?
- 19 Q. Yes, sir.
- 20 MR. ZABELL: Objection, leading.
- 21 JUDGE DAVIS: Overruled.
- 22 THE WITNESS: Yes.
- 23 BY MS. CABRERA:
- 24 Q. Do you recall at any point during that day hearing
- 25 Respondent's attorney, Mr. Zabell, say anything about

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

1 Immigration?

2 MR. ZABELL: Objection, leading.

3 JUDGE DAVIS: Overruled.

4 THE WITNESS: (In English) Yes, I listened about he say  
5 he report with Immigration.

6 JUDGE DAVIS: The last answer was given in English.

7 BY MS. CABRERA:

8 Q. And where --

9 MR. ZABELL: I'm sorry, it may have been English. I don't  
10 know if I didn't hear it --

11 JUDGE DAVIS: Repeat what you just said.

12 THE WITNESS: (In English) He say about the reporting  
13 with Immigration.

14 BY MS. CABRERA:

15 Q. And where were you when you heard Mr. Zabell say that?

16 A. (In Spanish) Sitting on the first row.

17 Q. The first row where?

18 A. It was another room just like this one.

19 Q. And what time of day was it?

20 A. About 11:00, I think.

21 Q. And were you alone?

22 A. No, all of us were fired were there.

23 Q. Can you give us the names of the employees who were there?

24 A. Yes, Roberto, Augustin, Henry, Marvin, Alex, Richard and  
25 me.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660

1 Q. Do you recall if anybody else was present in the room at  
2 the time?

3 A. Wester and Gilberto.

4 Q. Do you recall whether or not Mr. Zabell was talking to any  
5 other person?

6 MR. ZABELL: Objection, leading.

7 JUDGE DAVIS: Overruled.

8 THE WITNESS: No, he was talking to us. He pointed at us.  
9 He said that we were not able to get a penny.

10 BY MS. CABRERA:

11 Q. Do you recall if any lawyers from the Labor Board were  
12 present?

13 MR. ZABELL: Objection, leading.

14 JUDGE DAVIS: Overruled.

15 THE WITNESS: Henry Powell was.

16 BY MS. CABRERA:

17 Q. Do you recall hearing Mr. Powell say anything?

18 MR. ZABELL: Objection, leading.

19 A. Yes.

20 JUDGE DAVIS: Overruled.

21 THE WITNESS: Yes, he told them to stop.

22 MS. CABRERA: I have nothing else, Your Honor.

23 JUDGE DAVIS: Do you have any questions?

24 MS. PREECE: I have a question.

25 JUDGE DAVIS: I just have one question of the witness.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470  
(973) 692-0660



1						
2						
3	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
4						
5	Gilberto Mendoza	1177	1186	1238	1240	--
6						
7	Aldo Hernandez	1268	1278	1282	--	--
8						

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

- 1 Q Did you learn subsequently if anyone inside the room --
- 2 MR. ZABELL: Objection.
- 3 THE WITNESS: Yes.
- 4 JUDGE DAVIS: Overruled.
- 5 BY MR. POWELL:
- 6 Q So how did -- when did you learn that the employees or
- 7 that the witnesses had heard what Mr. Zabell said?
- 8 A After you put us in the -- inside of a room, inside I
- 9 guess it's called the library.
- 10 Q What did they tell you?
- 11 A Why the lawyer went crazy and started making those
- 12 accusation about Immigration and them going to jail.
- 13 Q Did they use the word immigration?
- 14 A Yes.
- 15 Q Now going back to prior to that, was there any other
- 16 interaction that you heard with -- was there anything else you
- 17 heard Mr. Zabell saying that day?
- 18 A Yes, the argument that he had with Mr. Powell.
- 19 Q Where were you standing when that argument took place?
- 20 A By the door.
- 21 Q Where exactly -- was anyone with you by the door?
- 22 A Ms. Sherri.
- 23 Q By which door, by the way?
- 24 A By the Hearing Room 3.
- 25 Q What did you hear?

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

1 A Mr. Zabell screaming this is a waste of time, you're never  
2 going to get a penny out of my client, you're all a bunch of  
3 immigrants; if they get up to the stand and give a statement,  
4 they will be committing perjury, so I'm going to take it to the  
5 grand jury so they can get deported.

6 Q What did you do upon hearing this?

7 A Just looked at you and you were debating with him back and  
8 forth, and telling him to just calm down and don't make those  
9 accusations.

10 Q What happened after that?

11 A You took all the witnesses, myself, Wester, into the  
12 library room.

13 Q And the witnesses, did they hear this? Where were they  
14 when this happened?

15 MR. ZABELL: Objection. Compound question.

16 MR. POWELL: I'll rephrase the question, Your Honor.

17 BY MR. POWELL:

18 Q Where were the witnesses during this statement?

19 A Inside the Hearing Room 3.

20 Q Where was Mr. Zabell?

21 A Inside the room, Hearing 3.

22 Q Where were you standing?

23 A By the door.

24 Q And you heard him say this?

25 A Yes.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 206  
Wayne, New Jersey 07470  
(973) 692-0660

# **The Imperial Sales**

## **EMPLEADO CÓDIGO DE CONDUCTA - PERSONAL DE ALMACÉN**

La empresa se adhiere a todas las leyes y reglamentos relativos a los trabajadores y seguridad en el trabajo. De acuerdo con esta práctica, no se permitirá ningún empleado que trabaja en el almacén de la empresa de utilizar su celular personal y / o teléfono inteligente, o cualquier otro dispositivo electrónico que no fue emitido de la compañía. Esto incluye la explotación de dichos dispositivos con los auriculares y / u otros componentes de manos libres. Cualquier violación de esta política dará lugar a inmediata disciplina de el empleado, hasta e incluyendo el despido.

Compartimientos celulares se proporcionará como una conveniencia para los empleados guardar sus teléfonos celulares, aunque los empleados piden dejar sus celulares en casa.

Empleados que utilizan su teléfono celular durante las horas de trabajo serán disciplinados hasta e incluir el despido

## **EMPLEADO CÓDIGO DE CONDUCTA - POLÍTICA DE TIEMPO Y ASISTENCIA**

El retraso del empleado interfiere con las operaciones comerciales de la compañía. Se requiere que todos los empleados hagan un informe para trabajar a tiempo. El tiempo del principio previsto para empleados es 8:00. Cualquier empleado que firme en más tarde que 8:05 será sujeto de disciplinar. Consecuente con esta política, los empleados que hacen un informe para trabajar tarde recibirán una advertencia disciplinaria. Si un empleado insiste en ser tarde, y acumulan tres (3) incidentes no perdonados del retraso durante un periodo de tiempo de balanceo de doce meses, serán sujetos a la terminación. No hay excepciones a esta regla.

Reconocimiento y acuerdo:

\_\_\_\_\_

Firma de empleado:

\_\_\_\_\_

Nombre de Empleado:

\_\_\_\_\_

Fecha:

\_\_\_\_\_

GC. 2 B

# The Imperial Sales

## EMPLOYEE CODE OF CONDUCT

### TIME AND ATTENDANCE POLICY

Employee lateness interferes with the company's business operations. All employees are required to report to work on time. The scheduled start time for employees is 8:00 am. Any employee who signs in later than 8:05 will be subject to discipline. Consistent with this policy, employees who report to work late will receive a disciplinary warning. If an employee persists in being late, and they accumulate three (3) unexcused incidents of lateness during a twelve month rolling time period, they will be subject to termination. There are no exceptions to this rule.

### WAREHOUSE PERSONNEL

The company adheres to all laws and regulations regarding worker and workplace safety. Consistent with this practice, no employee working in the company warehouse will be permitted to utilize their personal cell and/or smart phone, or any other non-company issued electronic device. This includes the operation of such devices with headphones and or/other hands-free components. Any violation of this policy will result in the immediate imposition of discipline, up to and including termination.

Cell phone bins will be provided as a convenience for employees to store their cell phones though employees are requested to leave their cell phones at home.

Employees who utilize their cell phone during work hours will be disciplined up to and including termination.

Acknowledged and Agreed:

\_\_\_\_\_  
Employee Signature

\_\_\_\_\_  
Employee Name

\_\_\_\_\_  
Date

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
JOSE REYES, JAIRO BONILLA, AUGUSTIN SABILLON,  
JAVIER REYES, SELVIN VASQUEZ, MARVIN  
HERNANDEZ, HENRY HERNANDEZ, JOSE OLAN  
AMADOR, ARMANDO LAZO, VALERIO BAQUEDANO,  
JOSE MICHEL TORRES, JOSE ARGUETA, NOEL EFRAIN  
CASTRO.

**COMPLAINT**

Plaintiffs,

-against-

THE IMPERIAL SALES, INC., TONY DINDRA, DANNY  
DINDRA, HERB MILLER.

Defendants.  
-----X

JURISDICTION AND VENUE

1. This action arises under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 et. seq.
2. This Court has jurisdiction under 28 U.S.C. §1331 and 29 U.S.C. § 216. Plaintiffs further invoke the supplemental jurisdiction of this Court pursuant to 28 U.S.C. § 1367.
3. Venue is proper in the Eastern District of New York according to 28 U.S.C. §1391 because the Defendants conduct business there and the cause of action arose there.

THE PARTIES

4. Plaintiff JOSE REYES resides in Huntington Station, New York and is employed by the Defendants.
5. Plaintiff JAIRO BONILLA resides in Westbury, New York, and is employed by the Defendants.
6. Plaintiff AUGUSTIN SABILON resides in Syosset, New York, and is employed by Defendants.
7. Plaintiff JAVIER REYES resides in Syosset, New York, and is employed by Defendants.
8. Plaintiff SELVIN VASQUEZ resides in Syosset, New York, and is employed by the Defendants.
9. Plaintiff MARVIN HERNANDEZ resides in Syosset, New York, and is employed by the Defendants.
10. Plaintiff HENRY HERNANDEZ resides in Westbury, New York, and is employed by the Defendants.
11. Plaintiff JOSE OLMAN AMADOR resides in Westbury, New York, and is employed by the Defendants.
12. Plaintiff ARMANDO LAZO resides in Hicksville, New York, and is employed by Defendants.

13. Plaintiff VALERIO BAQUEDANO resides in Westbury, New York, and was employed by Defendants.
14. Plaintiff JOSE MICHEL TORRES resides in Westbury, New York, and was employed by Defendants.
15. Plaintiff JOSE ARGUETA resides in Westbury, New York, and was employed by Defendants.
16. Plaintiff NOEL EFRAIN CASTRO resides in Uniondale, New York, and was employed by Defendants.
17. On information and belief, defendant IMPERIAL SALES ("Imperial") is a corporation formed in the State of New York and is located at 999 South Oyster Bay Road, Building 306 Bethpage, New York, 11714.
18. On information and belief, defendant TONY DINDRA ("Mr. Dindra") is a Principal Executive Officer of IMPERIAL with his principal place of business located at IMPERIAL, and is domiciled in New York.
19. On information and belief, Defendant DANNY DINDRA ("Mr. Danny") is a Principal Executive Officer of IMPERIAL with his principal place of business located at IMPERIAL, and is domiciled in New York.
20. On information and belief, Defendant HERB MILLER ("Mr. Miller") is the General Manager of IMPERIAL with his principal place of business located at IMPERIAL, and is domiciled in New York.

#### **BACKGROUND FACTS**

21. Defendant IMPERIAL is an "employer" under the Fair Labor Standards Act ("FLSA").
22. Each Plaintiff individually engaged in interstate commerce within the meaning of the FLSA by regularly using the instrumentalities of interstate commerce to perform their work, which was directly essential to defendants' business, including handling goods that were brought from locations outside of New York State and shipped from Imperial to locations outside of New York State.
23. On information and belief, IMPERIAL is owned, in whole or in part, by Mr. Dindra and Mr. Danny.
24. At all relevant times herein, Defendants IMPERIAL, MR. DINDRA, MR. DANNY, AND MR. MILLER:
  - i. Hire employees of IMPERIAL.
  - ii. Fire employees of IMPERIAL.
  - iii. Set wages for employees of IMPERIAL.
  - iv. Maintain payroll records for employees of IMPERIAL.

25. Defendants are involved in an industry affecting commerce within the meaning of the FLSA.
26. Defendant IMPERIAL's annual revenues exceed \$500,000 for the years 2014, 2013, and 2012.
27. The business activities of the Defendants are related and performed through unified operation or common control for a common business purpose and constitute an enterprise within the meaning of the FLSA.
28. Defendants failed to keep accurate and sufficient payroll and time records, as required by law.

**PLAINTIFF JOSE REYES:**

29. Defendants have employed Plaintiff **JOSE REYES** as a warehouse employee since April 2011.
30. Defendants paid Plaintiff **JOSE REYES** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.
31. Plaintiff **JOSE REYES** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.
32. Plaintiff **JOSE REYES** was routinely required to work approximately 5 hours on every Saturday and was not paid overtime for any hours worked on Saturday that were in excess of forty hours in the workweek.
33. Defendants would pay Plaintiff **JOSE REYES** in cash for work performed on Saturdays, and not record the time worked.
34. Plaintiff **JOSE REYES** was routinely required to work on Sundays for approximately 5 hours each Sunday and was not paid overtime for any hours worked on Sunday.
35. Defendants would pay Plaintiff **JOSE REYES** in cash for work performed on Sundays at a rate of \$10.00 per hour and not count the hours worked as overtime or include the time on Plaintiff **JOSE REYES** paycheck.
36. Plaintiff **Jose Reyes** would take a one half hour lunch each day, but Defendants would deduct one hour of pay from Plaintiff Jose Reyes' paycheck.
37. Plaintiff **JOSE REYES** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while working for Defendants.
38. At all relevant times herein, plaintiff **JOSE REYES** was not exempt from the FLSA.

**PLAINTIFF JAIRO BONILLA:**

39. Defendants have employed Plaintiff **JAIRO BONILLA** as a warehouse employee since August 2013.
40. Defendants paid Plaintiff **JAIRO BONILLA** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.



41. Plaintiff **JAIRO BONILLA** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.
42. In the year 2014, Plaintiff **JAIRO BONILLA** worked 30 hours of overtime for which he was paid straight time. Specifically, ten (1) hours on the week preceding Christmas, ten (10) hours during Christmas week, and ten (10) hours during the workweek immediately following the week of Christmas.
43. In the year 2014, Plaintiff **JAIRO BONILLA** worked 3 Saturdays for which he was not paid overtime. He worked 40 hours during each of the workweeks, Monday through Friday, and an additional eight (8) hours on the Saturdays. He was paid \$10.00 an hour in cash for the work performed on Saturdays and was not paid overtime.
44. Plaintiff **JAIRO BONILLA** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while working for Defendants.
45. At all relevant times herein, plaintiff **JAIRO BONILLA** was not exempt from the FLSA.

**AUGUSTIN SABILLON:**

46. Defendants have employed Plaintiff **AUGUSTIN SABILLON** as a warehouse employee since August 2010.
47. Defendants paid Plaintiff **AUGUSTIN SABILLON** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.
48. Plaintiff **AUGUSTIN SABILLON** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.
49. Plaintiff **AUGUSTIN SABILLON** was routinely required to work approximately 5 hours on every Saturday and was not paid overtime for any hours worked on Saturday that were in excess of forty hours in the workweek.
50. Defendants would pay Plaintiff **AUGUSTIN SABILLON** in cash for work performed on Saturdays, and not record the time worked.
51. Plaintiff **AUGUSTIN SABILLON** was routinely required to work on Sundays for approximately 5 hours each Sunday and was not paid overtime for any hours worked on Sunday.
52. Defendants would pay Plaintiff **AUGUSTIN SABILLON** in cash for work performed on Sundays at a rate of \$10.00 per hour and not count the hours worked as overtime or include the time on Plaintiff **AUGUSTIN SABILLON** paycheck.
53. Plaintiff **AUGUSTIN SABILLON** would take a one half hour lunch each day, but Defendants would deduct one hour of pay from Plaintiff **AUGUSTIN SABILLON**'s paycheck.
54. Plaintiff **AUGUSTIN SABILLON** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while working for Defendants.
55. At all relevant times herein, plaintiff **AUGUSTIN SABILLON** was not exempt from the FLSA.

**JAVIER REYES:**

56. Defendants have employed Plaintiff **JAVIER REYES** as a warehouse employee since August 2010.
57. Defendants paid Plaintiff **JAVIER REYES** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.
58. Plaintiff **JAVIER REYES** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.
59. Plaintiff **JAVIER REYES** was routinely required to work approximately 5 hours on every Saturday and was not paid overtime for any hours worked on Saturday that were in excess of forty hours in the workweek.
60. Defendants would pay Plaintiff **JAVIER REYES** in cash for work performed on Saturdays, and not record the time worked.
61. Plaintiff **JAVIER REYES** was routinely required to work on Sundays for approximately 5 hours each Sunday and was not paid overtime for any hours worked on Saturday.
62. Defendants would pay Plaintiff **JAVIER REYES** in cash for work performed on Sundays at a rate of \$10.00 per hour and not count the hours worked as overtime or include the time on Plaintiff **JAVIER REYES** paycheck.
63. Plaintiff **JAVIER REYES** would take a one half hour lunch each day, but Defendants would deduct one hour of pay from Plaintiff **JAVIER REYES**' paycheck.
64. Plaintiff **JAVIER REYES** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while working for Defendants.
65. At all relevant times herein, plaintiff **JAVIER REYES** was not exempt from the FLSA.

**SELVIN VASQUEZ:**

66. Defendants have employed Plaintiff **SELVIN VASQUEZ** as a warehouse employee since September 2013.
67. Defendants paid Plaintiff **SELVIN VASQUEZ** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.
68. Plaintiff **SELVIN VASQUEZ** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.
69. Plaintiff **SELVIN VASQUEZ** was routinely required to work approximately 5 hours on every Saturday and was not paid overtime for any hours worked on Saturday that were in excess of forty hours in the workweek.
70. Defendants would pay Plaintiff **SELVIN VASQUEZ** in cash for work performed on Saturdays, and not record the time worked.
71. Plaintiff **SELVIN VASQUEZ** was routinely required to work on Sundays for approximately 5

hours each Sunday and was not paid overtime for any hours worked on Saturday.

72. Defendants would pay Plaintiff **SELVIN VASQUEZ** in cash for work performed on Sundays at a rate of \$10.00 per hour and not count the hours worked as overtime or include the time on Plaintiff **SELVIN VASQUEZ** paycheck.

73. Plaintiff **SELVIN VASQUEZ** would take a one half hour lunch each day, but Defendants would deduct one hour of pay from Plaintiff **SELVIN VASQUEZ**'s paycheck.

74. Plaintiff **SELVIN VASQUEZ** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while working for Defendants.

75. At all relevant times herein, plaintiff **SELVIN VASQUEZ** was not exempt from the FLSA.

**MARVIN HERNANDEZ:**

76. Defendants have employed Plaintiff **MARVIN HERNANDEZ** as a warehouse employee since October 2010.

77. Defendants paid Plaintiff **MARVIN HERNANDEZ** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.

78. Plaintiff **MARVIN HERNANDEZ** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.

79. Plaintiff **MARVIN HERNANDEZ** was routinely required to work approximately 5 hours on every Saturday and was not paid overtime for any hours worked on Saturday that were in excess of forty hours in the workweek.

80. Defendants would pay Plaintiff **MARVIN HERNANDEZ** in cash for work performed on Saturdays, and not record the time worked.

81. Plaintiff **MARVIN HERNANDEZ** was routinely required to work on Sundays for approximately 5 hours each Sunday and was not paid overtime for any hours worked on Saturday.

82. Defendants would pay Plaintiff **MARVIN HERNANDEZ** in cash for work performed on Sundays at a rate of \$10.00 per hour and not count the hours worked as overtime or include the time on Plaintiff **MARVIN HERNANDEZ** paycheck.

83. Plaintiff **MARVIN HERNANDEZ** would take a one half hour lunch each day, but Defendants would deduct one hour of pay from Plaintiff **MARVIN HERNANDEZ**'s paycheck.

84. Plaintiff **MARVIN HERNANDEZ** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while working for Defendants.

85. At all relevant times herein, plaintiff **MARVIN HERNANDEZ** was not exempt from the FLSA.

**HENRY HERNANDEZ:**

86. Defendants have employed Plaintiff **HENRY HERNANDEZ** as a warehouse employee since April 2014.

87. Defendants paid Plaintiff **HENRY HERNANDEZ** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.
88. Plaintiff **HENRY HERNANDEZ** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.
89. Plaintiff **HENRY HERNANDEZ** was routinely required to work approximately 5 hours on every Saturday and was not paid overtime for any hours worked on Saturday that were in excess of forty hours in the workweek.
90. Defendants would pay Plaintiff **HENRY HERNANDEZ** in cash for work performed on Saturdays, and not record the time worked.
91. Plaintiff **HENRY HERNANDEZ** was routinely required to work on Sundays for approximately 5 hours each Sunday and was not paid overtime for any hours worked on Saturday.
92. Defendants would pay Plaintiff **HENRY HERNANDEZ** in cash for work performed on Sundays at a rate of \$10.00 per hour and not count the hours worked as overtime or include the time on Plaintiff **HENRY HERNANDEZ** paycheck.
93. Plaintiff **HENRY HERNANDEZ** would take a one half hour lunch each day, but Defendants would deduct one hour of pay from Plaintiff **HENRY HERNANDEZ**'s paycheck.
94. Plaintiff **HENRY HERNANDEZ** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while working for Defendants.
95. At all relevant times herein, plaintiff **HENRY HERNANDEZ** was not exempt from the FLSA.

**JOSE OLMAN AMADOR:**

96. Defendants have employed Plaintiff **JOSE OLMAN AMADOR** as a warehouse employee since April 2014.
97. Defendants paid Plaintiff **JOSE OLMAN AMADOR** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.
98. Plaintiff **JOSE OLMAN AMADOR** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.
99. Plaintiff **JOSE OLMAN AMADOR** was routinely required to work approximately 5 hours on every Saturday and was not paid overtime for any hours worked on Saturday that were in excess of forty hours in the workweek.
100. Defendants would pay Plaintiff **JOSE OLMAN AMADOR** in cash for work performed on Saturdays, and not record the time worked.
101. Plaintiff **JOSE OLMAN AMADOR** was routinely required to work on Sundays for approximately 5 hours each Sunday and was not paid overtime for any hours worked on Saturday.
102. Defendants would pay Plaintiff **JOSE OLMAN AMADOR** in cash for work performed on Sundays at a rate of \$10.00 per hour and not count the hours worked as overtime or include

the time on Plaintiff **JOSE OLMAN AMADOR** paycheck.

103. Plaintiff **JOSE OLMAN AMADOR** would take a one half hour lunch each day, but Defendants would deduct one hour of pay from Plaintiff **JOSE OLMAN AMADOR**'s paycheck.
104. Plaintiff **JOSE OLMAN AMADOR** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while working for Defendants.
105. At all relevant times herein, plaintiff **JOSE OLMAN AMADOR** was not exempt from the FLSA.

**ARMANDO LAZO:**

106. Defendants have employed Plaintiff **ARMANDO LAZO** as a warehouse employee since April 2014.
107. Defendants paid Plaintiff **ARMANDO LAZO** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.
108. Plaintiff **ARMANDO LAZO** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.
109. Plaintiff **ARMANDO LAZO** was routinely required to work approximately 5 hours on every Saturday and was not paid overtime for any hours worked on Saturday that were in excess of forty hours in the workweek.
110. Defendants would pay Plaintiff **ARMANDO LAZO** in cash for work performed on Saturdays, and not record the time worked.
111. Plaintiff **ARMANDO LAZO** was routinely required to work on Sundays for approximately 5 hours each Sunday and was not paid overtime for any hours worked on Saturday.
112. Defendants would pay Plaintiff **ARMANDO LAZO** in cash for work performed on Sundays at a rate of \$10.00 per hour and not count the hours worked as overtime or include the time on Plaintiff **ARMANDO LAZO** paycheck.
113. Plaintiff **ARMANDO LAZO** would take a one half hour lunch each day, but Defendants would deduct one hour of pay from Plaintiff **ARMANDO LAZO**'s paycheck.
114. Plaintiff **ARMANDO LAZO** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while working for Defendants.
115. At all relevant times herein, plaintiff **ARMANDO LAZO** was not exempt from the FLSA.

**VALERIO BAQUEDANO:**

116. Defendants employed Plaintiff **VALERIO BAQUEDANO** as a warehouse employee from October 2009 through October 2013.
117. Defendants paid Plaintiff **VALERIO BAQUEDANO** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.

118. Plaintiff **VALERIO BAQUEDANO** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.
119. Plaintiff **VALERIO BAQUEDANO** was routinely required to work approximately 5 hours on every Saturday and was not paid overtime for any hours worked on Saturday that were in excess of forty hours in the workweek.
120. Defendants would pay Plaintiff **VALERIO BAQUEDANO** in cash for work performed on Saturdays, and not record the hours worked.
121. Defendants would pay Plaintiff **VALERIO BAQUEDANO** in cash for work performed on Sundays at a rate of \$10.00 per hour and not count the hours worked as overtime or include the time on Plaintiff **VALERIO BAQUEDANO** paycheck.
122. Plaintiff **VALERIO BAQUEDANO** would take a one half hour lunch each day, but Defendants would deduct one hour of pay from Plaintiff **VALERIO BAQUEDANO**'s paycheck.
123. Plaintiff **VALERIO BAQUEDANO** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while working for Defendants.
124. At all relevant times herein, plaintiff **VALERIO BAQUEDANO** was not exempt from the FLSA.
125. Defendants retaliated against plaintiff **VALERIO BAQUEDANO** by terminating his employment because he complained about not being paid overtime.

**NOEL EFRAIN CASTRO:**

126. Defendants employed Plaintiff **NOEL EFRAIN CASTRO** as a warehouse employee from May 2009 through March 2014.
127. Defendants paid Plaintiff **NOEL EFRAIN CASTRO** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.
128. Plaintiff **NOEL EFRAIN CASTRO** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.
129. Plaintiff **NOEL EFRAIN CASTRO** was routinely required to work approximately 5 hours on every Saturday and was not paid overtime for any hours worked on Saturday that were in excess of forty hours in the workweek.
130. Defendants would pay Plaintiff **NOEL EFRAIN CASTRO** in cash for work performed on Saturdays, and did not record the hours worked.
131. Defendants would pay Plaintiff **NOEL EFRAIN CASTRO** in cash for work performed on Sundays at a rate of \$10.00 per hour and not count the hours worked as overtime or include the time on Plaintiff **NOEL EFRAIN CASTRO** paycheck.
132. Plaintiff **NOEL EFRAIN CASTRO** would take a one half hour lunch each day, but Defendants would deduct one hour of pay from Plaintiff Jose Reyes' paycheck.
133. Plaintiff **NOEL EFRAIN CASTRO** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while



working for Defendants.

134. At all relevant times herein, plaintiff **NOEL EFRAIN CASTRO** was not exempt from the FLSA.

135. Defendants retaliated against plaintiff **NOEL EFRAIN CASTRO** by terminating his employment because he complained about not being paid overtime.

**JOSE MICHEL TORRES:**

136. Defendants employed Plaintiff **JOSE MICHEL TORRES** as a warehouse employee from January 2012 through October February 2015.

137. Defendants paid Plaintiff **JOSE MICHEL TORRES** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.

138. Plaintiff **JOSE MICHEL TORRES** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.

139. Plaintiff **JOSE MICHEL TORRES** was routinely required to work approximately 5 hours on every Saturday and was not paid overtime for any hours worked on Saturday that were in excess of forty hours in the workweek.

140. Defendants would pay Plaintiff **JOSE MICHEL TORRES** in cash for work performed on Saturdays, and not record the hours worked.

141. Defendants would pay Plaintiff **JOSE MICHEL TORRES** in cash for work performed on Sundays at a rate of \$10.00 per hour and not count the hours worked as overtime or include the time on Plaintiff **JOSE MICHEL TORRES** paycheck.

142. Plaintiff **JOSE MICHEL TORRES** would take a one half hour lunch each day, but Defendants would deduct one hour of pay from Plaintiff **JOSE MICHEL TORRES**' paycheck.

143. Plaintiff **JOSE MICHEL TORRES** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while working for Defendants.

144. At all relevant times herein, plaintiff **JOSE MICHEL TORRES** was not exempt from the FLSA.

145. Defendants retaliated against plaintiff **JOSE MICHEL TORRES** by terminating his employment because he complained about not being paid overtime.

**JOSE ARGUETA:**

146. Defendants employed Plaintiff **JOSE ARGUETA** as a warehouse employee from September 2011 through February 2015.

147. Defendants paid Plaintiff **JOSE ARGUETA** an hourly wage rate of ten dollars (\$10.00) for all non-overtime hours.

148. Plaintiff **JOSE ARGUETA** regularly worked from Monday through Friday, from 8:00 am to 5:00 pm, approximately 45 hours per week.

149. Plaintiff **JOSE ARGUETA** was routinely required to work approximately 5 hours on every Saturday and was not paid overtime for any hours worked on Saturday that were in excess of forty hours in the workweek.
150. Defendants would pay Plaintiff **JOSE ARGUETA** in cash for work performed on Saturdays, and not record the hours worked.
151. Defendants would pay Plaintiff **JOSE ARGUETA** in cash for work performed on Sundays at a rate of \$10.00 per hour and not count the hours worked as overtime or include the time on Plaintiff **JOSE ARGUETA** paycheck.
152. Plaintiff **JOSE ARGUETA** would take a one half hour lunch each day, but Defendants would deduct one hour of pay from Plaintiff **JOSE ARGUETA**'s paycheck.
153. Plaintiff **JOSE ARGUETA** did not have the authority to hire or fire employees, did not supervise employees, and did not use his independent judgment or discretion while working for Defendants.
154. At all relevant times herein, plaintiff **JOSE ARGUETA** was not exempt from the FLSA.
155. Defendants retaliated against plaintiff **JOSE ARGUETA** by terminating his employment because he complained about not being paid overtime.

**AS AND FOR A FIRST CAUSE OF ACTION**  
**(Failure to pay overtime - Federal & State)**

156. Plaintiff repeats, re-alleges and reincorporates each and every allegation as though fully set forth herein.
157. Defendants have not compensated plaintiffs with overtime premium pay for hours worked in excess of 40 per week.
158. Pursuant to the FLSA & NYLL, Plaintiffs are entitled to one and one-half of their regular rate of pay for all hours worked in excess of 40 hours per workweek.
159. Defendant failed to pay Plaintiffs overtime for all overtime hours worked.
160. Defendants willfully refused and failed to compensate Plaintiffs for overtime work, causing damage to Plaintiffs.

**AS AND FOR A SECOND CAUSE OF ACTION**  
**(Wage Theft Prevention Act)**

161. Plaintiffs repeat, re-allege and reincorporate each and every allegation as though fully set forth herein.
162. Pursuant to the Wage Theft Prevention Act, New York Labor Law, §195, Defendants willfully failed to furnish Plaintiffs with a required notice containing the following information:
  - i. the rates or rates of pay and basis thereof,



- ii. whether paid by the hour, shift, day, week, salary, piece, commission or other allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances;
- iii. the regular pay designated by the employer in accordance with NYLL §191;
- iv. the name of the employer;
- v. Any "doing business as" names used by the employer;
- vi. The physical address of the employer's main office or principal place of business, and a mailing address, if different;
- vii. The telephone number of the employer

163. Defendants willfully failed to furnish Plaintiffs with an accurate statement of wages as required by NYLL §195(3), containing the dates of work covered by that payment of wages; name of the employee; name of the employer; address and phone number of employer; rate or rates of pay and basis thereof; whether paid by hour, shift, day, week, salary, piece, commission, or other; gross wages; hour rate or rates of pay, and overtime rates of pay; the number of hours worked, including over time hours; deductions, allowances, and net wages.

164. Due to Defendant's violation of NYLL §195(1), Plaintiff is entitled to recover from Defendants liquidated damages of \$50 per workweek that the violation occurred, up to a maximum of \$2,500, reasonable attorneys fees, and costs and disbursements of this action, pursuant to NYLL § 198(1-b).

**AS AND FOR A THIRD CAUSE OF ACTION**  
**(RETALIATION- FEDERAL & STATE)**

165. Plaintiffs repeats, re-alleges and reincorporates each and every allegation as though fully set forth herein.
166. Pursuant to NYLL and the FLSA, it is unlawful for an employer to retaliate against an employee for complaining or inquiring into their rights with respect to the pay.
167. Defendants retaliated against the Plaintiffs by terminating their employment for complaining about not being properly paid overtime pursuant to NYLL and the FLSA.
168. By Defendants retaliation, Plaintiffs suffered damages.

**AS AND FOR A FOURTH CAUSE OF ACTION**  
**(FAILURE TO PAY WAGES- NYLL)**

169. Plaintiffs repeat, re-allege and reincorporate each and every allegation as though fully set forth herein.
170. Pursuant to NYLL §191, an employer must pay a manual working employee no later than paid weekly and not later than seven calendar days after the end of the week in which the wages are earned.
171. Defendants failed to pay Plaintiffs with at least one half hour of work for each day the

employees worked and took lunch.

172. Defendants have unlawfully withheld Plaintiffs' wages in violation of NYLL, causing damages to Plaintiffs.

JURY DEMAND

173. Plaintiffs demand trial by jury.

WHEREFORE, Plaintiffs respectfully pray that this Court enter a judgment:

- i. Directing Defendants to pay Plaintiffs overtime premium pay for all hours worked in excess of 40 per week pursuant to 29 U.S.C. §216 and NYLL;
- ii. Directing Defendants to pay Plaintiff for any and all unpaid wages pursuant to NYLL for time worked and not accounted for.
- iii. Directing Defendants to pay Plaintiffs additional amounts as liquidated damages due to Defendants' willful failure to pay overtime pay pursuant to 29 U.S.C. § 216 and New York Labor Law.
- iv. Directing Defendants to pay damages to Plaintiffs under the Wage Theft Prevention Act of \$50 per workweek, up to \$2,500 per plaintiff, plus reasonable counsel fees, and costs, and disbursements;
- v. Directing Defendants to pay Plaintiff's costs and attorneys fees, pursuant to the FLSA and New York Labor Law;
- vi. Prejudgment interest, post-judgment interest, costs and disbursements, and such other and further relief as this Court deems just and equitable.

Dated: Westchester, NY  
July 6, 2015

Yours, etc.,

/S/ Jordan El-Hag

Jordan El-Hag, Esq.  
Attorney for Plaintiffs  
777 Westchester Ave, Suite 101  
White Plains, N.Y, 10604  
(914) 755-1579 (p)  
(914) 206-4176 (f)  
Jordan@elhaglaw.com  
www.elhaglaw.com



## CERTIFICATION

This is to certify that the attached English language documents, identified as Nueva grabacion 2 and Nueva grabacion 17, are a true and accurate translation and transcription of the original Spanish language documents to the best of our knowledge and belief.

Schreiber Translations, Inc.

51 Monroe Street

Suite 101

Rockville, MD 20850

P: 301.424.7737

F: 301.424.2336

Executed this 7<sup>th</sup> day  
of December, 2015

Schreiber Translations, Inc.  
51 Monroe Street, Suite 101  
Rockville, Maryland 20850  
ATA Member 212207

Schreiber Translations, Inc. uses all available measures to ensure the accuracy of each translation, but shall not be held liable for damages due to error or negligence in translation or transcription.

translation@schreibernet.com

www.schreibernet.com

10(a)

## AUDIO INFORMATION

File(s)
Phone call. New Recording 17.
Audio Interview
Tape length: 00:14:03

## LEGEND

Action/ID	Description
Speakers	
UM1	Unidentified Male 1
UM2	Unidentified Male 2
UMX	Various Male Speakers. Unidentifiable.
U/I	Unintelligible
I/A	Inaudible

SPEAKER	TRANSCRIPT	TRANSLATION
UM1	<i>Old man. Old man.</i>	<i>Old man. Old man.</i>
UMX	¿Vienes a verlo? [UI]	You are coming to see it? [UI]
UM2	<i>Where? I mean How long does it take to get from there to here. Over there [UI]</i>	<i>Where? I mean How long does it take to get from there to here. Over there [UI]</i>
UM1	Vamos viejo, vamos. Estás como tú nombre, <i>Old man</i> .	Let's go old man. You are just like your name <i>Old man</i> [T.N.: there may be a play between "Old man" and a last name that is mentioned further down, "Goldman". However transcriber does not have a list of participants and can only transcribe names phonetically.]
	[UI]	[UI]
UM2	<i>Okey. I was served these papers.</i>	<i>Okay. I was served these papers.</i>
UM1	Okey. El corte nos dieron estos papeles.	Okay. The Court gave these papers.
UM2	<i>All your names. All these guys names are here. They are all suing me.</i>	<i>All your names. All these guys names are here. They are all suing me.</i>
UM1	Todos los nombres que están ahí, somos nosotros que estamos aquí.	All the names that are here, it's us who are here.
UM2	<i>They are suing me.</i>	<i>They are suing me.</i>
UM1	Lo están demandando a él.	You are suing him.
UM2	<i>That I have not paid them for some wages.</i>	<i>That I have not paid them for some wages.</i>
UM1	Que ustedes trabajaron sábados y domingos y nosotros no pagamos.	That you worked on Saturdays and Sundays and we did not pay you.

<u>SPEAKER</u>	<u>TRANSCRIPT</u>	<u>TRANSLATION</u>
UM2	<i>That you worked here Saturdays and Sundays and I didn't pay you.</i>	<i>That you worked here Saturdays and Sundays and I didn't pay you.</i>
UM1	[UI]	[UI]
UM2	<i>I didn't pay you overtime. So each one is separately, you know, say it over there. So you can explain [UI]</i>	<i>I didn't pay you overtime. So each one is separately, you know, say it over there. So you can explain [UI]</i>
UM1	Todos los nombres están aquí. Empezaron con Roberto. Y dicen. Tienen Jaro, que vive en Westbury. Agustin que vive en [UI]. Y tú no vives en [UI]. Javier que vive en [UI]. [UI] que vive en [UI]	All the names are here. They started with Roberto. And they say. They have Jaro, who lives in Westbury. Agustin who lives in [UI]. And you don't live in [UI]. Javier who lives in [UI]. [UI] who lives in [UI]
UMX	Yo no vivo en [UI]	I don't live in [UI]
UM1	[UI] que vive en [UI]. Y Marvin que vive en [UI]. Henry vive en Westbury. Okay. So, esto nos dice que hay algo malo aquí porque ustedes no viven en [UI] ni nada de eso. So, nosotros queremos saber, cómo eso está pasando si ustedes no saben nada de esto. ¿Ustedes saben? ¿Alguien les habló sobre esto?	[UI] who lives in [UI]. And Marvin who lives in [UI]. Henry who lives in Westbury. Okay. So, this tells us there is something wrong here because you don't live in [UI] or anything like that. So, we want to know, how is this happening if you don't know anything about it? Do you know? Did someone talk to you about this?
UMX	Como pueden saberlo es hablando ahí, ¿no?	The way you can find out is calling there, right?
UM1	Ah?	Ah?
UMX	Como pueden saberlo es hablando a quien les envió eso, ¿no?	The way you can find out is talking to whoever send it to you, right?
UM1	No, dice que son de ustedes. Mira los nombres.	No, it says it's you. See the names.
UMX	No, por eso. Pero ahí.	No, that's why. But there.
UMX	¿Quién envió eso? [UI]	Who send that? [UI]
UMX	Debe haber un número o algo.	Must be a number or something.
UM1	El corte dice que ustedes. Hay un abogado que se llama Jordan L. [UI]	The court says it's you. There is an attorney called Jordan L. [UI]
UMX	Ajá.	Yes.
UM1	Este es el nombre. Y él está en Westchester. En Westchester. So, ¿ustedes saben de eso o ustedes firmaron papeles de eso?	That's the name. And he is in Westchester. In Westchester. So, do you know about that or did you sign papers about that?
UMX	La manera de saberlo es, como le digo, es hablando a ese número, no.	The way you can tell is, like I said, calling that number, right.
UM1	No dice aquí. No, no hay número. Solo hay una persona aquí que. Nosotros. No. Él está diciendo que.	It doesn't say here. There is no number. There's only the name of a person here saying that. We. No. He's saying that.
UMX	[UI] ¿Que si han hablado con alguien para que ellos manden esto?	[UI] Have you talked to anyone so that they send this?
UM1	<i>This lawyer is saying that he is representing them.</i>	<i>This lawyer is saying that he is representing them.</i>
UM2	Yes.	Yes.
UM1	So.	So.

<b>SPEAKER</b>	<b>TRANSCRIPT</b>	<b>TRANSLATION</b>
UM2	<i>There is no union here. There is no union.</i>	<i>There is no union here. There is no union.</i>
UM1	[UI]	[UI]
UM2	<i>It's only you guys sued me that I did not pay your salary. Each one is separately. Like Roberto work here every Saturday, every Sunday he works here and I don't pay him. [UI]</i>	<i>It's only you guys sued me that I did not pay your salary. Each one is separately. Like Roberto work here every Saturday, every Sunday he works here and I don't pay him. [UI]</i>
UMX	Dice que.	It says.
UM1	Todos. Uno por uno.	Everyone. One by one.
UMX	Es una. Como Roberto que dice que trabajó sábado y domingos. Siempre trabajó y nunca le han pagado. Ahí dice en el papel.	It's a. Like Roberto who says he worked Saturdays and Sundays. He always worked and was never paid. That's on the paper.
UM2	<i>Okey go to the next one. Everybody is in it.</i>	<i>Okay go to the next one. Everybody is in it.</i>
UM1	<i>No, everybody is the same thing. Yea. José. Jairo Bonilla that he worked Saturday.</i>	<i>No, everybody is the same thing. Yea. José. Jairo Bonilla that he worked Saturday.</i>
UM2	<i>No, he worked on Christmas night. His is different. He worked on Christmas night.</i>	<i>No, he worked on Christmas night. His is different. He worked on Christmas night.</i>
UM1	Okey. Selvin Vazquez.	Okay. Selvin Vazquez.
UM2	[UI] Saturday, Sundays.	[UI] Saturday, Sundays.
UM1	Selvin Vazquez [UI] worked	Selvin Vazquez [UI] worked
UM2	[UI]	[UI]
UM1	<i>Yes. Five hours. Yea. Defendant [UI] Selvin.</i>	<i>Yes. Five hours. Yea. Defendant [UI] Selvin.</i>
UM2	<i>When did you work on Sundays?</i>	<i>When did you work on Sundays?</i>
UMX	[UI] trabajabas los domingos	[UI] used to work on Sundays
UM1	Tú nunca has trabajado en un domingo aquí. Nunca.	You've never worked a Sunday in here. Never.
UM2	<i>You do [UI]</i>	<i>You do [UI]</i>
UM1	¿Tú has trabajado en domingo aquí?	Have you ever worked here on a Sunday?
UMX	Cuando nos mudamos, sí.	When we moved, yes.
UM1	<i>Oh, yea. Ese es el único tiempo que hubo [UI] Pero dice que todas las semanas. A ver qué dice el papel aquí. Que.</i>	<i>Oh, yea. That's the only time there was [UI] But it states that it's every week. Let's see what the paper says here. That.</i>
UM2	<i>But if he worked [UI], did I pay you?</i>	<i>But if he worked [UI], did I pay you?</i>
UM1	<i>Oh, yea. Y cuando trabajamos el, cuando nos mudamos, ¿te pagaron para el día que trabajaste? Okey. Who else? Henry. Same thing. Henry [UI] the defendant to be [UI] Henry would take off. Y dicen que ustedes cogieron media hora para lunch y le quitaron una hora. Nosotros siempre hemos tenido 15 minutos de break y 45 minutos de lunch. Él dice que</i>	<i>Oh, yea. And when we worked the, when we moved, did they pay you for the day you worked? Okay. Who else? Henry. Same thing. Henry [UI] the defendant to be [UI] Henry would take off. And it says you took a half hour for lunch and they took out one hour. We have always had the 15 minute break and 45 minute lunch. He says you worked through lunch, that you were not</i>



SPEAKER	TRANSCRIPT	TRANSLATION
	ustedes trabajaron de <i>lunch</i> , que no les dieron <i>lunch</i> . So, ese es otra cosa. <i>Let's see who else. Yep.</i> Que tú trabajaste domingo también. Goldman, Alexis Goldman. Él mismo. Que tú trabajaste domingo. Tú nunca trabajaste domingo. Tú nunca trabajaste domingo.	given <i>lunch</i> . So, that's another thing. <i>Let's see who else. Yep.</i> That you worked Sundays too. Goldman, Alexis Goldman. Himself. That you worked Sunday. You never worked Sundays. You never worked Sundays.
UM2	[UI] <i>I was reading. They all say the same thing.</i>	[UI] <i>I was reading. They all say the same thing.</i>
UM1	Hasta Valerio que tienen aquí. Tienen hasta Valerio. El nombre de Valerio. El nombre de Chele. ¿Y tienen qué más? Tienen Chele. Tienen a Alex. Y tienen Mitchell. <i>They have Alex and Mitchell names' in here, the same thing, that they worked Saturday and Sunday.</i>	They even have Valerio in here. They even have Valerio. Valerio's name. Chele's name. And they have who else? They have Chele. They have Alex and they have Mitchell. <i>They have Alex and Mitchell names' in here, the same thing, that they worked Saturday and Sunday.</i>
UM2	<i>All these guys worked Saturdays in there.</i>	<i>All these guys worked Saturdays in there.</i>
UM1	<i>Yea. I know. All of them. Everyone of them.</i>	<i>Yea. I know. All of them. Everyone of them.</i>
UM2	[UI]	[UI]
UM1	Dice que todos ustedes todos.	It says that you all.
UMX	Han trabajado.	Have worked.
UM1	Ni cuando nos mudamos tú trabajaste domingos y sábados. Ni cuando mudamos, ¿verdad? Tú nunca trabajaste un domingo. Porque no me dejaste [UI] cuando mudamos.	Not even when we moved did you work Sundays and Saturdays. Not even when we moved, correct? You never worked on a Sunday. Because you would not let me [UI] when we moved.
UM2	<i>Okay. Let's come to serious matter.</i>	<i>Okay. Let's come to serious matter.</i>
UM1	<i>Okay.</i>	<i>Okay.</i>
UM2	<i>So you guys sued me.</i>	<i>So you guys sued me.</i>
UM1	Ustedes lo están demandando a él.	You are suing him.
UM2	<i>So now I have to defend myself.</i>	<i>So now I have to defend myself.</i>
UM1	Pero él se tiene que defender.	But he has to defend himself.
UM2	<i>I have to go to the court and say, I didn't do it. You have to say, No, do this, get me this, get me this. So I have to basically go like this. You know. Because.</i>	<i>I have to go to the court and say, I didn't do it. You have to say, No, do this, get me this, get me this. So I have to basically go like this. You know. Because.</i>
UM1	Tiene que ir a corte y tiene que defenderse [UI]	He has to go to court and defend himself [UI]
UM2	<i>If I don't go [UI]</i>	<i>If I don't go [UI]</i>
UM1	[UI]	[UI]
UM2	[UI] <i>I'm guilty.</i>	[UI] <i>I'm guilty.</i>
UM1	[UI] pues él va a defensa con él. Él se va a defender, dice.	[UI] so he is going to defense with him. He is going to defend himself, he says.
UM2	<i>So now the question is this. We are fighting or we are not fighting? I didn't pay you or did I not pay you? That's the question.</i>	<i>So now the question is this. We are fighting or we are not fighting? I didn't pay you or did I not pay you? That's the question.</i>

SPEAKER	TRANSCRIPT	TRANSLATION
UM1	La cosa es que si van a pelear esto o no. Si le pagaron o no le pagaron.	The thing is if you are going to fight this or not. If you were paid or you were not paid.
UM2	<i>That's the question. There's two things going to happen. I have to go to court and say I paid everybody, so now I am going to supoena, supoena, supoena, supoena. Bring over all that you have to say.</i>	<i>That's the question. There's two things going to happen. I have to go to court and say I paid everybody, so now I am going to subpoena, subpoena, subpoena, subpoena. Bring over all that you have to say.</i>
UM1	El tiene que ir a corte [UI].	He has to go to court [UI].
UM2	[UI] You guys, you can say, I worked Saturdays and Sundays.	[UI] You guys, you can say, I worked Saturdays and Sundays.
UM1	Igual tiene que defenderse.	He has to defend himself just the same.
UM2	<i>I worked Saturdays and Sundays. he didn't pay me.</i>	<i>I worked Saturdays and Sundays. he didn't pay me.</i>
UM1	<i>Wait. Let me explain to them. Y no sólo demandaron a él y al hermano. Me demandaron a mí también. Como si yo soy dueño. Yo no tengo nada que hacer con este negocio. Yo ni siquiera estoy aquí sábado y domingo. Sólo cuando nos mudamos. Pero mi nombre está ahí que me están demandando a mí. You seen that, right? My name is down there.</i>	<i>Wait. Let me explain to them. And you not only sued him and his brother. You sued me too. As if am an owner. I don't have anything to do with this business. I'm not even here Saturdays and Sundays. Only when we moved. But my name is in here that you are suing me. You seen that, right? My name is down there.</i>
UM2	<i>They can see, you guys can see.</i>	<i>They can see, you guys can see.</i>
UM1	El nombre mío está ahí que yo. [UI]	My name is here that I. [UI]
UM2	[UI] your name on the copy [UI]	[UI] your name on the copy [UI]
UM1	Ahí están los nombres de todos.	Everyone's name is in there.
UM2	<i>This is your name.</i>	<i>This is your name.</i>
UMX	<i>And this says Imperial, me, Danny, and [UI]. This is your name.</i>	<i>And this says Imperial, me, Danny, and [UI]. This is your name.</i>
UM1	[UI] Mira los nombres.[UI] Y los van a encontrar.	[UI] See the names.[UI] And you will find them.
UMX	Aquí está Henry.	Here's Henry.
UM1	<i>Mira, lo pueden ver. Ustedes todos están ahí. Pero la cosa es éste. Si ustedes quieren demandar a él, a nosotros, pues, yo también. Ellos me van a cubrir a mí, yo no tengo nada que hacer con eso, anyway. Pero, lo que ellos están diciendo que si ustedes van a seguir peleando esto.</i>	<i>Look, you can see. You are all in there. But the thing is this. If you want to sue him, us, well, me too. They are going to cover me, I have nothing to do with that, anyway. But what they are saying is that if you are going to continue fighting this.</i>
UMX	[UI]	[UI]
UM1	<i>El tiene que defenderse. So, él tiene que demandarles a ustedes para. Van a la corte y que testigan. Van a [UI] de testigos y ya. Que si es cierto que les ha. If you owe them or if you don't owe them.</i>	<i>He has to defend himself. So, he has to sue you for. You go to court and have you witness. You are going to [UI] as witnesses and that's it. If it's true that he has. If you owe them or if you don't owe them.</i>
UM2	<i>Yes. But do I owe you? Any of them? Let me ask you this question everyone. Do I owe anybody anything?</i>	<i>Yes. But do I owe you? Any of them? Let me ask you this question everyone. Do I owe anybody anything?</i>



SPEAKER	TRANSCRIPT	TRANSLATION
UM1	Y si él debe alguien algo, dice.	And if he owes anything to anyone, he says.
UM2	<i>Any [UI] I never pay anybody. Like I made you work and I don't want to pay you?</i>	<i>Any [UI] I never pay anybody. Like I made you work and I don't want to pay you?</i>
UM1	Quiso trabajar y nunca te han pagado. <i>Yea, that's a good question. ¿Alguien cree que él les debe ahora de que trabajaron un sábado o un domingo en que no consiguieron pago?</i>	You wanted to work and were never paid. <i>Yea, that's a good question. Does anyone think he owes you now for working on a Saturday or Sunday that you did not get paid?</i>
UMX	Overtime no.	Not overtime .
UM1	<i>Yea. Overtime no. That's. Overtime es algo. [UI]</i>	<i>Yea. Not Overtime. That's. Overtime is something [UI]</i>
UM2	<i>Overtime. How much? It's not going to be. Nobody works a whole Saturday, Sunday. How many times overtime you work? Tell me.</i>	<i>Overtime. How much? It's not going to be. Nobody works a whole Saturday, Sunday. How many times overtime you work? Tell me.</i>
UMX	Nosotros trabajamos.	We worked.
UMX	<i>[UI] I work like five per week.</i>	<i>[UI] I work like five per week.</i>
UM2	<i>But not Sunday. Never Sunday.</i>	<i>But not Sunday. Never Sunday.</i>
UMX	<i>Not Sunday. But I work like.</i>	<i>Not Sunday. But I work like.</i>
UM1	Pero él te dice.	But he is saying to you.
UMX	<i>For three months like.</i>	<i>For three months like.</i>
UM2	<i>But no Sunday.</i>	<i>But no Sunday.</i>
UMX	<i>Three months [UI] you worked on Saturdays?</i>	<i>Three months [UI] you worked on Saturdays?</i>
UMX	No. No.	No. No.
UM1	<i>You guys worked Saturdays?</i>	<i>You guys worked Saturdays?</i>
UMX	[UI]	[UI]
UM1	Mira. La alarma. la alarma del building. Y cuando ponchan tiene todo eso.	Look. The alarm. The building's alarm. And when you punch in he has all that.
UMX	No sirve la alarma del. Cuando uno poncha sale.	It doesn't work the alarm for the. When you punch in it shows.
UM1	No, no, no. En la alarma que cortaron. En la alarma cuando entran en el building. Él tiene todo eso.	No, no, no. The alarm that was cut. The alarm when you get into the building. He has all of that.
UM2	<i>Every Saturday.</i>	<i>Every Saturday.</i>
UM1	Él puede saber cuál sábado trabajamos. Sólo tenemos que recordar todo eso. Eso está en papel. Pero la cosa es ese. Nunca, nunca trabajamos el domingo. El único tiempo que trabajamos siete días es por cuando nos mudamos aquí.	He can tell which Saturday we worked on. We just have to keep that in mind. Everything is on paper. But that's the thing. We never, ever worked Sundays. The only time we worked seven days is when we moved here.
UMX	[UI] Cuando nos mudamos aquí.	[UI] When we moved here.
UM1	Sí. Eso es cierto, pero [UI] trabajaron.	Yes. That's true, but [UI] worked.
UMX	Yo he trabajado como tres domingos.	I have worked like three Sundays.
UM1	¿Cuándo?	When?
UMX	<i>Uff, hace tiempo, como cuando casi empecé. Que íbamos a arreglar los [UI].</i>	<i>Uff, long time, like right around when I started. That we were going to fix the [UI].</i>

SPEAKER	TRANSCRIPT	TRANSLATION
UM1	¿Dónde aquí?	Where, in here?
UMX	Allá en la otra compañía.	Over at the other company.
UMX	En el otro <i>building</i> .	At the other <i>building</i> .
UM1	¿El domingo? No.	On a Sunday? No.
UMX	Sí, yo he trabajado los siete días.	Yes, I have worked all seven days.
UMX	Lo que dice aquí en los papeles tiene que estar eso ahí.	What's stated in the papers that has to be in there.
UM1	<i>Yea</i> , si eso está.	<i>Yea</i> , that's in there.
UMX	Ahí está. Ahí está el [UI] ahí está [UI]	It's right there. There's the [UI] there's the [UI]
UMX	[UI]	[UI]
UM1	<i>Yea</i> . Exacto, eso está ahí. Okey, si eso está ahí. Yo nunca he oído del domingo. ¿Con quién?	<i>Yea</i> . Exactly, that's there. Okay, if that's in there. I have never heard of Sundays. With who?
UMX	Yo sí he ido. Con Charlate yo he ido que una vez nos tocó hacer de [UI] nada más, trabajamos siete días.	I have gone. With Charlate I went once we had to make [UI] nothing else, we worked seven days.
UM1	Yo no sabía de eso. Porque tú sabes, como yo no estoy aquí los domingos.	I didn't know that. Because you know I am not here on Sundays.
UM2	<i>He worked on Sundays?</i>	<i>He worked on Sundays?</i>
UM1	<i>He said that he had like three [UI]</i>	<i>He said that he had like three [UI]</i>
UMX	Yo trabajaba los domingos también.	I worked Sundays too.
UM1	¿Cuándo?	When?
UMX	Yo trabajaba varios domingos. Muchos domingos.	I worked several Sundays. Many Sundays.
UMX	¿Cómo cuántos?	Like how many?
UMX	Hey, hey, hey.	Hey, hey, hey.
UM2	<i>No, no, no. They say that they worked. I don't know where they get that [UI]</i>	<i>No, no, no. They say that they worked. I don't know where they get that [UI]</i>
UMX	Que llamen al abogado que dicen que tiene el nombre ahí.	Have them call the attorney you say is named in there.
UM1	<i>Yea</i> . Ellos lo están chequeando.	<i>Yea</i> . They are checking.
UMX	Yo le voy a decir algo, mire.	I'm going to say something to you. Look.
UMX	El que les diga [UI] les diga eso.	Whoever is saying [UI] saying that to you.
UM1	[UI] Tú ni quieres trabajar los sábados y estás diciendo que trabajaste domingo.	[UI] You don't even want to work Saturdays and you are saying you worked on Sundays.
UMX	Pero cuando comenzamos a trabajar nosotros trabajamos muchos domingos.	But when we first started working we worked a lot of Sundays.
UM1	¿Con quién?	Who with?
UMX	Lo puede chequear.	You can check.
UMX	Fueron como tres domingos no más.	It was just like three Sundays.
UMX	No. Trabajamos muchos domingos.	No. We worked many Sundays.
UMX	Richie. Richie.	Richie. Richie.
UM1	¿Cuándo fue eso?	When was this?
UMX	Hace tiempo cuando [UI]	Long time when [UI]

<u>SPEAKER</u>	<u>TRANSCRIPT</u>	<u>TRANSLATION</u>
UMX	Hace como unos tres años.	About three years ago.
UMX	Un año o tres años.	A year or three years.
UM1	<i>Three years ago.</i>	<i>Three years ago.</i>
UMX	Que trabajamos.	We worked.
UMX	Es más, ahorita, hace poco, yo trabajé con Roberto un domingo.	What's more, not that long ago, I worked with Roberto on a Sunday.
UM2	<i>Why you?</i>	<i>Why you?</i>
UM1	<i>I don't know. I never.</i>	<i>I don't know. I never.</i>
UM2	<i>On Sunday we do something? Like you were doing something?</i>	<i>On Sunday we do something? Like you were doing something?</i>
UM1	<i>No, they said they were selling tickets.</i>	<i>No, they said they were selling tickets.</i>
UM2	<i>On Sunday?</i>	<i>On Sunday?</i>
UM1	<i>Selling [UI] .</i>	<i>Selling [UI] .</i>
UMX	Trabajamos varios domingos.	We worked several Sundays.
UMX	Yo no me recuerdo eso.	I don't recall that.
UMX	Yo trabajé varios domingos. Muchos domingos. Con Roberto trabajamos los domingos también.	I worked several Sundays. Many Sundays. We also worked with Roberto on Sundays.
UM1	Roberto nunca trabajó domingo. Roberto tiene su otro trabajo.	Roberto never worked Sundays. Roberto has his other job.
UMX	Si.	Yes.
UM1	Sábado y domingo.	Saturdays and Sundays.
UMX	Venimos a trabajar, cuando estábamos mudando. Cuando estábamos mudando vinimos unos domingos.	We came to work when we were moving. When we were moving we came some Sundays.
UM1	[UI] Yo dije eso, yo dije eso. Pero no cuando.	[UI] I said that, I said that. But not when.
UMX	Pero yo sí le digo que sí he [UI]	But I am telling you I did [UI]
UM1	<i>Yea. Okey. Ese. Que yo no sé. Vamos a chequear.</i>	<i>Yea. Okay. That. That I don't know. We'll check.</i>
UMX	No, chequeénlo pero yo trabajaba los domingos. Sí, yo trabajaba los domingos. Sí.	No, check it out but I did work Sundays, Yes, I worked Sundays. Yes.
UMX	Pero no es que es todos los domingos, sino que fueron.	But it's not like it was every Sunday but that it was.
UM2	<i>Let's step back. So, two days. You said how many days?</i>	<i>Let's step back. So, two days. You said how many days?</i>
UM1	<i>Two or three.</i>	<i>Two or three.</i>
UM2	<i>Two or three days total, right? I didn't pay you?</i>	<i>Two or three days total, right? I didn't pay you?</i>
UMX	<i>Two or three days.</i>	<i>Two or three days.</i>
UM2	<i>How many days to you?</i>	<i>How many days to you?</i>
UMX	Yo he trabajado varios domingos. Solo puedo decir varios.	I have worked several Sundays. I can only say several
UM1	Yo ese yo no creo. Porque si tú no. Si tú ni siquiera quieres trabajar los sábados para mí.	I that I don't believe. Because if you don't. If you don't even want to work Saturdays for me.

SPEAKER	TRANSCRIPT	TRANSLATION
UMX	No, no. Yo trabajaba los domingos.	No, no. I worked on Sundays.
UM1	Ah pues, sabes que no hay problema. Vamos a chequear.	Oh well, you know that's no trouble. We will check.
UMX	No, pero chequeéelo.	No, but check it out.
UM1	Sí, vamos a chequearlo.	Yes, we will check it out.
UMX	¿Sabe qué? Una cosa yo le voy a querer. Yo sé que nadie quiere hablar.	You know what? There is one thing I want to. I know nobody wants to speak up.
UM1	Diga.	Go ahead.
UMX	Pero yo le voy a decir algo. ¿Sabe qué nos dijo el abogado?	Because I'll tell you something. You want to know what the lawyer said to us?
UM2	So [UI] days? [UI]	So [UI] days? [UI]
UMX	Para que usted le transmita a él después. El abogado nos dijo, que si ustedes nos hacían preguntas a nosotros, que nosotros no les contestáramos nada.	So you can convey this to him afterwards. The attorney told us that if you asked us questions, that we do not answer anything.
UMX	Que hablaran con él.	To talk to him.
UM1	No quieres contestar [UI]	You don't want to respond [UI]
UMX	Qué hablaran con él porque ahí está el número de él, dice.	To call him because his number is right there, he said.
UM1	Pues tú si no quieres hablar no tienes que hablar.	Well if you don't want to talk you don't have to talk.
UMX	Sí, ahí dice.	Yes, it's in there.
UMX	Nosotros [UI]	We [UI]
UMX	[UI] A todos nos aconsejó.	[UI] He advised all of us.
UMX	Lo que pasa es que ellos sólo querían saber si hemos trabajado domingo.	What happens is that they just wanted to know if we have worked on Sundays.
UM1	Yea. Eso es todo. Pero si ustedes no quieren hablar de eso no hay problema.	Yea. That's it. But if you don't want to talk about it, no problem.
UM	Sábado y domingo.	Saturday and Sunday.
UMX	Como yo le digo. Sábados hemos trabajado mucho.	Like I said. We have worked a lot of Saturdays.
UMX	[UI]	[UI]
UM1	¿Qué abogado les dijo eso?	Which attorney said that to you?
UMX	Él. Él.	Him. Him.
UM1	Oh, ¿tú lo conoces?	Oh, you know him?
UMX	Que llame ahí el número porque ellos no quieren que nosotros le digamos nada.	Have him call the number in there because they don't want us to say anything.
UM1	No hay número allí para llamar. No hay nada ahí para [UI]	There's no number here to call. There's nothing here for [UI]
UMX	Tiene que haber número [UI]	There must be a number [UI]
UM1	No hay número aquí mira. Solo hay nombre y dónde está en White Plains.	There is no number here, look. There is just the name and that he is in White Plains.
UMX	[UI]	[UI]
UM1	No tiene nada de teléfonos.	There is nothing here with phone numbers.
UMX	[UI]	[UI]
UM1	Yo creo que no va [UI]	I don't think he is going to [UI]

SPEAKER	TRANSCRIPT	TRANSLATION
UMX	[UI]	[UI]
UM1	Ah?	Ah?
UMX	<i>My ride is outside. I got to go.</i>	<i>My ride is outside. I got to go.</i>
UM2	<i>Okey so you guys want to go ahead with the lawsuit?</i>	<i>Okay so you guys want to go ahead with the lawsuit?</i>
UM1	¿Quieren, quieren demandarme entonces?	So you want to sue me then?
UMX	<i>You can tell me with the lawyer.</i>	<i>You can tell me with the lawyer.</i>
UM2	<i>No, I don't want to talk to attorney. I'm just going to go for the court and just go after it.</i>	<i>No, I don't want to talk to attorney. I'm just going to go for the court and just go after it.</i>
UMX	[UI]	[UI]
UM2	<i>You have to do what you have to do.</i>	<i>You have to do what you have to do.</i>
UM1	<i>Yea. That's it. Él tiene que defenderse igual como ustedes tienen eso.</i>	<i>Yea. That's it. He has to defend himself just like you have that.</i>
UM2	<i>Okay. That's it.</i>	<i>Okay. That's it.</i>
UM1	<i>No hay problema. No problem.</i>	<i>No problem. No problem.</i>
UMX	Oye, Jaro.	Hey, Jaro.
UM	¿Pudiste cogerlo?	Were you able to get it?
UM	[UI]	[UI]
UM	¿Y te [UI] tiempo?	And you [UI] time?
UM	[UI]	[UI]
UM	Que se defienda pero [UI] trabajaba varios domingos [UI]	He can defend himself [UI] worked several Sundays [UI]
UM	[UI]	[UI]
UM	[UI]	[UI]
UM	[UI]	[UI]
UM	Sí. Háblenle a Armando que no.	Yes. Speak to Armando that no.
	[End of audio]	[End of audio]



## CERTIFICATION

Schreiber Translations, Inc.

51 Monroe Street

Suite 101

Rockville, MD 20850

P: 301.424.7737

F: 301.424.2336

This is to certify that the attached English language documents, identified as Nueva grabacion 2 and Nueva grabacion 17, are a true and accurate translation and transcription of the original Spanish language documents to the best of our knowledge and belief.

Executed this 7<sup>th</sup> day  
of December, 2015

Schreiber Translations, Inc.  
51 Monroe Street, Suite 101  
Rockville, Maryland 20850  
ATA Member 212207

Schreiber Translations, Inc. uses all available measures to ensure the accuracy of each translation, but shall not be held liable for damages due to error or negligence in translation or transcription.

translation@schreibernet.com

www.schreibernet.com

10(5)



## AUDIO INFORMATION

Phone call. New Recording 2.
Audio Interview
Tape length: 00:14:04

## LEGEND

Acronym	Description
Speakers	
UM1	Unidentified Male 1
UM2	Unidentified Male 2
UM3	Unidentified Male 3
UMX	Various Male Speakers
U/I	Unintelligible
I/A	Inaudible

SPEAKER	TRANSCRIPT	TRANSLATION
UM1	Okey. ¿Todos estamos aquí ahora?	Okay. We are all here now?
UM1	[UI] Empezar a decir. Esta mañana. A las cuatro y media me levanté. Ninguno me llamó. Mi alarma sonó y yo me levanté. Esta mañana ustedes se levantaron. No sé qué hora. Ninguno nos llamó. Y están [UI] hoy. Okey. Les digo eso porque si. Ninguno no le está acosando para venir a trabajar. Si no quieren estar aquí. [UI] Okey. <i>As simple as that</i> . La otra cosa es esta. Ustedes van a votar para unión. Esto es que va a pasar. Si pasan. Si votan y quieren. Y la unión entra. Lo que va a pasar es. Van a tener que ir de huelga porque nosotros no vamos a aceptar eso. <i>So</i> , los que votan <i>Si</i> . Les estoy diciendo ahorita van a perder sus trabajos porque van a ir allá, parar afuera con la unión. Los otros que no votan van a estar aquí, trabajando, y vamos a traer gente nuevo. <i>So</i> , la gente que no, que votan, y van allá afuera, les estoy diciendo ahorita, si quieren ir desde ahora, porque no van a tener	[UI] Start to say. This morning. I got up at four thirty. Nobody called me,. My alarm went off and I got up. This morning you got up. I don't know what time. Nobody called us. And you are [UI] today. Okay. I tell you that because if. Nobody is harassing you to come to work. If you do not want to be here. [UI] Okay. <i>As simple as that</i> . Here's the other thing. You are going to vote for union. This is what will happen. If [it] passes. If you vote and you want. And the union gets in. What is going to happen is. You will have to strike because we are not going to accept that. <i>So</i> , those who vote <i>Yes</i> . I am telling now that you will lose your jobs because you are going to go out there, stand outside with the union. Those who don't vote are going to be here, working and, and we will be bringing new people. <i>So</i> , people who don't, who vote, and go out there, I am telling you now, if you want you can go now, because you will not have a job. We will not bring the others [UI]. The others are going to. You

SPEAKER	TRANSCRIPT	TRANSLATION
	<p>trabajo. Los otros no vamos a traerlos [UI]. Los otros van. Tú sabes lo que. Lo único que puede hacer la unión es parar allá afuera a. ¿Cómo decirles? [UI] No sé cómo decirlo en español. Pero nosotros vamos a traer gente nuevo porque yo sé que todos no van a votar. Yo tengo 100 por ciento que no todos van a votar. So, los que votan, yo les estoy diciendo desde ahora, si quieren. No van a regresar aquí porque van a perder su trabajo. Porque nosotros vamos a pelear esto. Cuando nos vayamos de aquí. Donde nos vamos, ni pueden entrar ahí. En el <i>lunch</i>. So. Ese. Quiero que sepan esto. Si tienen uno problema y no quieren estar aquí. Yo no. Yo no entiendo qué pasó. Yo me siento traicionado porque yo siempre les ha tratado a todos bien. Pues antes de que yo llegué aquí no cogieron <i>coffee break</i> ni cogieron nada. Cuando yo llegué aquí yo cambié todo. Si ustedes creen que yo le estoy haciendo algo o tratándole mal, me vienen a hablar porque todos somos hombres. Yo no le gusta este que cada dos minutos están ahí chisteando como mujeres en el [UI]. Tienen que. Si tienen problemas, vengan a verme. Yo les doy mucho. ¿Cómo se dice? Ah. Libertad. Los teléfonos yo no digo nada. La música, yo no digo nada. Vienen con <i>shorts</i>, vienen con <i>tennis</i>, yo no digo nada. Okey. Si ustedes quieren cambio, cuidado que es lo que están pidiendo. Okey. Porque va a cambiar mucho. Pero yo les estoy diciendo desde ahora, los que votan que van a ir a la unión, van a perder su trabajo. Porque nosotros vamos a pelearlo hasta el fin. Y todo lo que la unión puede hacer, como le digo, es parar allá afuera a, a. No pueden entrar en el terreno de nosotros. Pueden estar ahí, gritando a [UI], a cinco minutos es lo que se van a hacer. Porque cuando se fue Chele, se fue Fran, se fue para meses. Tú te fuiste para meses. Hasta Alex cuando se murió su hermana se fue para meses. Y siempre lo cogimos para atrás. Podemos sobrevivir sin cada uno de nosotros, incluido yo. Cuando tú te fuiste, cuando Chele se fue, creímos que era el fin del mundo, que no podemos hacerlo. Estamos haciendo bien. Si tú te vas, si tú te vas, si tú te vas.</p>	<p>know what. The only thing the union can do is to stand outside for. How can I tell you? [UI] I don't know how to say it in Spanish. But we will bring new people because I know that not all of you will vote. I have 100 percent that not all are going to vote. So, those who do vote, I am telling you as of now, if you want. You are not coming back in here because you will lose your job. <u>Because we will fight this. When we leave here. Wherever we go, you cannot go in there either. During lunch. So. That, I want you to know this. If you have one problem and don't want to be here. I don't. I don't know what happened. I feel betrayed because I always treated everyone right. Because prior to my getting here you did not take coffee break or take anything. When I got here I changed everything. If you feel I'm doing something to you or treating you poorly, come talk to me because we are all men. I don't like that every two minutes you be there joking like women at the [UI]. You have to. If you have problems come see me. I give you a lot. How do you say that? Ah. Freedom. The phones I don't say anything. You come wearing shorts, wearing tennis, I don't say anything. Okay. If you want change, careful what you ask for. Okay. Because a lot will change. But I am telling you right now, those who vote for the union, you will lose your job. Because we will fight it until the end. And all the union can do, like I said, is to stand outside to, to. They cannot enter our premises. They can be out there, yelling for [UI], for five minutes is what they can do. Because when Chele left and Fran left, they left for months. You left for months. Even Alex when his sister died left for months. And we always took him back. We can survive without each and everyone of us, including me. When you left. When Chele left. We thought it was the end of the world. That we could not make it. We are doing fine. If you leave, if you leave, if you leave. And you left for months. And we are fine without you. So all of you who think we cannot make it without you, try to see and let's see what happens. I don't understand what happened with this union thing, but now I see Alex and Victor out there with them. But I don't know what is going on. You know more than I do. Because I know you were hanging with Mitchell and they told you. I was not there but I am 100 percent</u></p>



SPEAKER	TRANSCRIPT	TRANSLATION
	Y tú te fuiste para meses. Y estamos bien sin ti. <i>So</i> todos que creen que no podemos hacer sin ti, sin ustedes, traten de verlo y vamos a ver qué pasa. Yo no entiendo qué pasó con este unión cosa, pero ahora yo veo a Alex y a Víctor allá afuera, con ellos, pero yo no sé qué está pasando. ustedes saben más que yo. Porque yo sé que ustedes andaban con Mitchell y ellos les dijo. Yo no estaba ahí pero yo estoy 100 por ciento que él...	that he...
UM2	La pregunta es por qué lo botaron a él.	The question is why was he fired.
UM1	¿Por qué lo botaron a quién? No lo botamos.	Why was who fired? We did not fire him.
UM2	[UI]	[UI]
UM1	No lo botamos. Martín. Yo le dije a Mitchell, que él estaba reemplazando a.	We did not fire him. Martin. I told Mitchell, that he was replacing.
UM2	Para un trabajo no va a dar tres meses, dos meses para [UI]	You are not going to give three months, two months for [UI] at a job.
UM1	Yo le dije eso, yo le dije a Mitchell, que yo necesitaba a alguien hasta que regresaba Juan.	I said that to him. I told Mitchell I needed someone until Juan returned.
UM2	Pero [UI] no le dijeron nada a nadie porque.	But [UI] you did not say anything to anyone because.
UM1	Yo le dice. Yo le dije ese a Mitchell que necesitaba. Por eso es que le trae porque igual no estaba aquí.	I say to him. I said this to Mitchell that I needed. That is why I bring [him] because he was not here just the same.
UM2	Pero si está claro que es que a él lo botaron porque [UI]	But it is clear that he was fired because [UI]
UM3	Pero aquí [UI] se botó.	But here [UI] was fired.
UM1	Nosotros no botamos a ellos. Nosotros les damos <i>lay off</i> a los dos. Eso es lo que dijo a ellos. [UI]	We did not fire them. We gave them <i>both lay off</i> . That's what was said to them. [UI]
UM2	[UI]	[UI]
UM1	Mira, si ustedes están del lado de él, váyanse, váyanse no hay problema. Váyanse. No hay problema, no, porque.	Look, if you are on his side, leave, leave, no problem. Leave. There's no problem, no, because.
UM2	[UI] de ellos. Nada más es tener claro. Tener claro. Siempre hemos trabajado aunque [UI] el trabajo [UI]	their [UI]. It's just to have an understanding. Have things clear. We have always worked in spite of [UI] the work [UI]
UM3	Exacto.	Exactly.
UM2	[UI] nunca hemos hecho eso.	[UI] we have never done that.
UM1	Mira. Hay razones para todas cosas. Okey. Dime algo. ¿Tú crees que Mitchell? ¿Tú crees que Mitchell debe estar cogiendo el dinero que tú coges aquí? ¿Trabajando?	Look. There are reasons for everything. Okay. Tell me something. You think that Mitchell? You think Mitchell should be getting the money you get here? Working?
UM2	Pero si lo trabaja.	But if he does the work.
UM1	¿Tú crees que Mitchell? ¿Cómo se dice? <i>He deserves</i> el dinero que él está	You think Mitchell? How do you say that? <i>He deserves</i> the money he is making here.

SPEAKER	TRANSCRIPT	TRANSLATION
	ganando aquí. ¿Tú crees que tú trabajas más duro que Mitchell?	You believe you work harder than Mitchell?
UM2	Eso sólo ustedes lo saben.	You are the ones who know that.
UM1	Okey. <i>Alright</i> . Hay razones para cada. Que tú ves. Hay razón para algo. Okey. Hay razón para algo. Todo lo que yo quiero decirles.	Okay. <i>Alright</i> . There are reasons for every. That you see. There is reason for something. Okay. There is reason for something. All that I want to tell you.
UMX	No es que nosotros estamos al lado de ellos pero yo sólo eso quería decirle, ¿me entiende? Perdón. Y otra cosa. [UI] Mire, no es por [UI] ni nada pero ahí como nos dijo que seamos hombres [UI] eso no es de mujeres. Usted sabe que nos puede decir, Oh, no, que podemos hablar.	It's not that we are on their side but I just wanted to mention it to you. You see? Excuse me. And another thing. It's not for [UI] or anything but since you asked us to be men [UI] that's not a woman thing. You know you can say to yes, Oh, no, that we can talk.
UM1	Eso es que yo le dije. No sea mujeres, están allá. Cada minuto están allá.	That's what I said. Don't be like women. You are over there. Every minute you are over there.
UMX	[UI] no tiene que [UI] como mujeres, tú sabes.	[UI] does not have to [UI] like women, you know.
UM1	Mira, yo estaba haciendo un ejemplo. Eso es que estaban haciendo. Hablando allá. Cada vez que voy allá, están allá. Mira. Cada uno de ustedes les. Yo no. Tony y Danny no son. ¿Cómo se dice <i>saints</i> ? ¿Cómo se dice <i>saints</i> [UI]	Look. I was making an example. That is what I was doing. Talking over there. Every time I go over, you are over there. Look. Each one of you. I don't. Tony and Danny are not. How do you say, <i>saints</i> ? How do you say, <i>saints</i> [UI]
UMX	Carlos [?] Carlos [?]	Carlos [?] Carlos [?]
UM1	No son. No son.	They're not. They're not.
UMX	[UI]	[UI]
UM1	No, no, no. <i>Saints. Saints</i> . No son santos. No son santos. Okey. Ellos tienen sus faltas. Yo no estoy 100 porciento alegre todo el tiempo con ellos también. Yo tengo mis problemas con ellos. Pero todos los días yo me levanto y yo vengo aquí. Ellos no me llaman y me dicen venga. El día que ellos, que no me gusta lo que ellos están haciendo no voy a venir. Y yo les dije eso. Y esto es que yo les estoy diciendo. Cuando ustedes no están, no están alegres para venir a trabajar. No vengán. Vayan a buscar otro. Pero no vengán a causarme problemas a mí porque este va a ser problema para mí.	No, no, no. <i>Saints. Saints</i> . They are not saints. They are not saints. Okay. They have their faults. I am not 100 percent happy with them too, I have my issues with them. But I get up every day and I come here. They don't call me and tell me to come. The day they, that I don't like what they are doing, I am not coming. And I told them that. And that is what I am telling you. When you are not happy to come to work. Don't come in. Go get another one. But don't come and cause me trouble because this is going to be a problem for me.
UMX	[UI] se levanta para venir aquí, nosotros también nos levantamos.	[UI] you get up to come here. We also get up.
UM1	Exacto. Exacto. Y si tú no quieras estar aquí, no vengas, no vengas, si no quieres.	Exactly. Exactly. And if you don't want to be here, don't come, don't come if you don't want to.
UMX	Si es que venimos es porque queremos [UI]	If we come it's because we want to [UI]

SPEAKER	TRANSCRIPT	TRANSLATION
UMI	Exacto. Y ellos les pagan porque les quieren aquí. Ustedes vienen porque quieren el dinero. Eso es todo. Okey.	Exactly. And they pay you because they want you here. You come because you want the money. That's it. Okay.
UMX	[UI]	[UI]
UMI	Pero si van a empezar a hacer trabajo para nosotros o problemas para nosotros, yo no les quiero aquí. Ustedes. Yo les ha tratado bien todo el tiempo. Si ustedes quieren que les trato mal, ustedes van a ver. Okey. Pero yo le estoy diciendo uno, una cosa, los que. La unión nunca va a entrar porque nosotros vamos a pelear. Ustedes se van. Van a parar allá. Por semanas. Van a ver si pueden ir unas dos, tres semanas sin pago. Nosotros vamos a traer a otra gente y los va a lastimar para un semana, dos semanas, pero van a aprender. Igual como tú aprendiste, como tú aprendiste todo, los nuevos van a venir y van a aprender el trabajo. Si ustedes creen que [UI] Váyanse, tienen el derecho para hacerlo. Váyanse. Pero yo estoy aconsejando que cuando lo hacen, si van a ir y se van a ir ahí a parar. <i>That's it.</i> No van a tener. No van a regresar aquí para trabajar. <i>That's it. It's over. So.</i> Eso es todo lo que quería que sabiera. ¿Tiene pregunta alguien?	But if you're going to start work for us or trouble for us, I don't want you here. You. I have treated you right the whole time. If you want me to treat you poorly, you shall see. Okay. But I am telling you one, one thing, those who. The union is never getting in because we will fight. You are going to go. To stand over there. For weeks. You shall see if you can go some two, three weeks without pay. We will bring other people and it will hurt them for one week, two weeks, but they will learn. Just like you learned, like you learned everything. The new people will come and learn the job. If you think that [UI]. Leave, you have the right to do so. Leave. But I am counseling that when you do, if you leave and you are going to stand over there. <i>That's it.</i> You will not have. You are not coming back here to work. <i>That's it. It's over. So.</i> That's what I wanted you to know. Anyone have a question?
UMX	[UI] lo único que yo aquí. Yo quisiera que algún día la compañía fueran conscientes con el trabajador. Aunque sea [UI] a los trabajadores. Y eso [UI]	[UI] the only thing here that I. I'd like for the company to be aware of the workers some day. At least [UI] to the workers. And that [UI]
UMI	Déjeme preguntarle algo a ustedes. ¿En el país de ustedes cuando trabajaron, un día ustedes estaban conseguir el pago para ir a trabajar?	Let me ask you something. In your country when you had work, one day you would get paid for going to work?
UMX	Sí, todos teníamos allá.	Yes, we all had them over there.
UMX	[UI]	[UI]
UMI	¿Sabes por qué? Porque estaban. Allá estaban. Tienen todo el derecho aquí. Mira, yo no sé qué la unión le está diciendo a ustedes, pero, no [UI] no tienen social bueno. ¿Qué van a hacer en la unión para usted? No pueden hacer.	You know why? Because they were. You were over there. You have all the rights here. Look, I know what the union is telling you. But, no [UI] they don't have good social. What are they going to do for you in the union? They cannot do.
UMX	A mi esposa no tienen papeles y a ella le pagaban holiday, le pagaban.	My wife has no papers and she was paid for holiday, they paid her.
UMI	¿Con quién trabaja, con quién trabaja?	Who does she work for? Who does she work for?
UMX	Ahí con el hotel.	At the hotel.
UMI	Si es compañía grande y pueden hacerlo.	If it's a big company and they can afford it.
UMX	[UI]	[UI]

SPEAKER	TRANSCRIPT	TRANSLATION
UM1	Y pueden hacerlo, mejor para ella. Mira si no están feliz	And they can do it, good for her. Look if you are not happy
UMX	Hay muchas compañías que son así.	There are many companies that are like that.
UM1	Que no están consiguiendo el pago. Váyanse. Váyanse. Eso es todo.	that you are not getting paid. Leave. Leave. That's it.
UMX	Yo, en el trabajo que yo tuve antes, si yo iba a trabajar en [UI], me pagaban triple ese día.	Me, at the job I used to have, if I went in to work on [UI], I would get triple pay that day.
UMX	¿Y ahora dónde está la compañía?	And where is the company now?
UMX	Por la economía se [UI]	Because of the economy it went [UI]
UM1	Exacto. Y esta compañía es pequeño que él tiene que proteger esto. Tiene que proteger. Si ellos empiezan a pagar eso, ¿qué van a pasar? ¿Qué van a pasar a ellos? No van a, no van a ser él. Ustedes no saben. Ustedes ven todo lo que hay aquí. Ustedes no saben. Cada vez que yo vengo y pongo esa luz, es dinero; es dinero. Si no están feliz, con lo que está ganando, pueden irse. Me pueden decir, Mira, dame dos semanas de sueldo. No hay problema. Pueden irse. Cada persona que está aquí, puede ser reemplazado. Incluido yo. So [UI] todos nosotros podemos. Alguien puede venir y puede hacer nuestro trabajo. Si no están feliz, váyanse. Pero dejan de, no vayan a traer problemas para mí porque yo no voy a estar feliz y si yo no estoy feliz ustedes no van a estar feliz.	Exactly. And this is a small business that he has to protect all this. he has to protect. If they start paying for that, what's going to happen? What's going to happen to them? They're not going to, they're not going to be the. You don't know. You see all that's here. You don't know. Every time I come and put on that light, it's money, it's money. If you are not happy with what you make, you can leave. You can tell me, Look, give me two weeks wages. No problem. You can leave. Each person here can be replaced. Including me. So [UI] we all can be. Someone can come in and do our job. If you are not happy, leave. But stop, don't bring problems for me because I am not going to be happy and if I am not happy you will not be happy.
UMX	No es problema para usted.	It's not a problem for you.
UM1	Es problema para mí. <i>Yes</i> .	It's a problem for me. <i>Yes</i> .
UMX	Porque. Le voy a decir un ejemplo. Mire. Yo no le alego lo que usted me está diciendo ni nada pero, usted tiene que ir tanto a favor de los dueños, a favor de los trabajadores.	Because. I will give you an example. Look. I am not disputing what you say or anything but you have to be in favor of the owners as well as in favor of the workers.
UM1	Exacto. Exacto	Exactly. Exactly.
UMX	Porque es <i>manager</i> . Tiene que ir a favor. Tiene que hablar a favor de los trabajadores.	Because you are a <i>manager</i> . You have to be in favor. You have to speak for the workers.
UM1	Exactly. Ya. Yo siempre estoy haciendo eso. Por eso es que yo puedo conseguir todo lo que yo he conseguido para ustedes que cojan el <i>break</i> . El <i>coffee break</i> no venía aquí antes. <i>Listen</i> . Si no están feliz, [UI] si no están feliz. Yo no les llamo todo el día y decirles que vengan aquí. Si no están felices, váyanse, váyanse, váyanse todos, no importa. Yo voy a seguir aquí y yo voy a entrenar a todos para que hagan el	Exactly. Right. I am always doing that. That is why I can get everything I have gotten for you. So you can take the <i>break</i> . There was no <i>coffee break</i> here before. <i>Listen</i> . If you are not happy, [UI] if you are not happy. I don't call you all day long and ask you to come in here. If you are not happy, leave, leave. You can all leave, it does not matter. I will stay here and I am going to train everyone to do the work. Okay. Anyone of you. Be a man and tell me, I don't want to be here. I'm

SPEAKER	TRANSCRIPT	TRANSLATION
	trabajo. Okey. Cualquiera de ustedes. Sean hombres y me dicen, Yo no quiero estar aquí, yo me voy. Váyanse. Dame dos semanas o si quieres. Cuando tú te ibas, me preguntaste, cuando me llamaste para regresar te traje. Tú querías traer tu hermano y tu dos hermanos traeron. [UI] cuando necesitas algo vas a Tony. [UI] y te ayuda. Juan, pues se fue. Cuando tú te fuiste [UI] Luis [UI] tú llegaste aquí con tu hermano. Tú estás aquí yo te di tu hermano trabajo por ti. <i>So</i> , todos, es como una familia. Todos somos. Yo no sé por qué [UI] <i>I don't know how to [UI] this</i> . Este empezó de nada. No sé de dónde empezó todo esto. Ese es la problema. Nosotros estábamos bien aquí. Alguien les está metiendo cosas en la cabeza pero si lo quieren, si no me creen, hagan lo que tienen que hacer y [UI]. <i>Do what you gotta do</i> . Van a ver qué va a pasar. Eso es todo lo que les tengo que decir. <i>That's it. Alright</i> .	leaving. Leave. Give me two weeks or if you want. When you were leaving you asked me, when you called me to come back I brought you back. You wanted to bring your brother and your two brothers were brought in. [UI] when you need something you go to Tony [UI] and helps you. Juan, well he took off. When you left [UI] Luis [UI] you came here with your brother. You are here I gave your brother work because of you. <i>So</i> , everyone, it's like a family. We all are. I don't know why [UI] <i>I don't know how to [UI] this</i> . This started from nothing. I don't know where this started. That is the problem. We were fine here. Someone is putting things in your head but if you want it, if you don't believe me, do what you got to do and [UI]. <i>Do what you gotta do</i> . You'll see what happens. That's all I got to say to you. <i>That's it. Alright</i> .
UMX	[UI]	[UI]
	[Various UMX talking in the background]	[Various UMX talking in the background]
UMX	Yo le grabé todo.	I recorded it all.
UMX	Oh, sí va después dice, imagina, con mujeres.	Oh, yes, then he says, can you believe it, with women.
UMX	[UI]	[UI]
UMX	Que una mujer [UI]	That a woman [UI]
	[End of audio][00:13:50]	[End of audio][00:13:50]



# Notas de voz

Nueva grabación 3

12/12/15 1:18:20

Nueva grabación

12/3/15 0:57:24

Nueva grabación 17

7/15/15 0:14:04

Nueva grabación 2

3/10/15 0:14:05

0:00

-14:04



Editar

1100



# Notas de voz

Nueva grabación 3

12/12/15 1:18:20

Nueva grabación

12/3/15 0:57:24

Nueva grabación 17

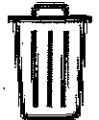
7/15/15 0:14:04

0:00

-14:03



Editar



Nueva grabación 2

3/10/15 0:14:05

#GC11-B

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
**STIPULATED ELECTION AGREEMENT**

**The Imperial Sales, Inc.**

**Case 29-RC-146077**

The parties **AGREE AS FOLLOWS:**

**1. PROCEDURAL MATTERS.** The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

**2. COMMERCE.** The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

The Imperial Sales, Inc., herein called the Employer, with its office and primary place of business located at 60 Gordon Drive, Syosset, New York, is engaged in the business of the wholesale sale and distribution of beauty and housewares products. During the past year, the Employer, in the course and conduct of its business operations, purchased and received goods and materials valued in excess of \$50,000 directly from entities located outside the State of New York. The Employer is engaged in commerce within the meaning of the Act.

**3. LABOR ORGANIZATION.** The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

**4. ELECTION.** A secret-ballot election under the Board's Rules and Regulations shall be held under the supervision of the Regional Director on the date and at the hours and places specified below.

**DATE:** March 24, 2015      **HOURS:** 8:00 a.m. to 8:50 a.m.

**PLACE:** The warehouse area adjacent to Herb Miller's office by the large west facing loading door at the Employer's 60 Gordon Drive, Syosset, NY location.<sup>1</sup>

If the election is postponed or canceled, the Regional Director, in his or her discretion, may reschedule the date, time, and place of the election.

**5. UNIT AND ELIGIBLE VOTERS.** The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time warehouse helpers, pickers, loaders and forklift operators working at and out of 60 Gordon Drive, Syosset, NY.

<sup>1</sup> The Employer has agreed to turn off all surveillance cameras at the Employer's 60 Gordon Drive, Syosset, NY facility, for the period of the election, which record the warehouse area adjacent to Herb Miller's office in addition to all exits in and out of said area.

GC-22



Excluded: All others including managers, clerical employees, guards, and supervisors, as defined under the Act.

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending February 20, 2015**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

**6. ELECTION ELIGIBILITY LIST.** Within seven (7) days after the Regional Director has approved this Agreement, the Employer shall provide to the Regional Director an election eligibility list containing the full names and addresses of all eligible voters. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *North Macon Health Care Facility*, 315 NLRB 359 (1994).

**7. THE BALLOT.** The ballot shall be in English and Spanish. A sample of the ballot that will be used at the election is attached to this stipulated election agreement. All parties should notify the Region as soon as possible of any voters or potential voters who only read a language other than English.

The question on the ballot will be "Do you wish to be represented for purposes of collective bargaining by Local 660, United Workers of America? The choices on the ballot will be "Yes" or "No".

**8. NOTICE OF ELECTION.** The Notice of Election shall be in English and Spanish. The Employer will post copies of the Notice of Election in conspicuous places and usual posting places easily accessible to the voters at least three (3) full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

**9. ACCOMMODATIONS REQUIRED.** All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

**10. OBSERVERS.** Each party may station authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

**11. TALLY OF BALLOTS.** Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

(Employer)

**By**

(Name)

(Date)

(Petitioner)

By

(Name)

(Date)

(Union)

Aggie KAPELMAN, Field Attorney (Date)

By

(Name)

(Date)

**Date approved:**

**Regional Director, Region 29  
National Labor Relations Board**



UNITED STATES OF AMERICA  
ESTADOS UNIDOS DE AMERICA  
NATIONAL LABOR RELATIONS BOARD  
JUNTA NACIONAL DE RELACIONES DEL TRABAJO  
FORM NLRB-707N2A (English and Spanish) (10-07)



# OFFICIAL SECRET BALLOT PAPELETA SECRETA OFICIAL

For certain employees of  
Para ciertos empleados de

~~THE IMPERIAL SALES, INC.~~

Do you wish to be represented for purposes of collective bargaining by-  
¿Desea usted estar representado para los fines de negociar colectivamente por-

LOCAL UNION 660, UNITED WORKERS OF AMERICA

MARK AN "X" IN THE SQUARE OF YOUR CHOICE  
MARQUESE CON UNA "X" DENTRO DEL CUADRO DE SU SELECCIÓN

YES  
SI

☐

NO  
NO

☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.  
If you spoil this ballot return it to the Board Agent for a new one.

The National Labor Relations Board does not endorse any choice in this election.  
Any markings that you may see on any sample ballot have not been put there by the  
National Labor Relations Board.

NO FIRME ESTA PAPELETA. Dóblela y depósitela en la urna electoral.  
Si usted daña esta papeleta devuélvala al Agente de la Junta y pídala una nueva.

La Junta Nacional de Relaciones del Trabajo no respalda a ninguna de las opciones  
en esta elección. Cualquier marca que se pueda ver en cualquier muestra de la papeleta  
no fue hecha por la Junta Nacional de Relaciones del Trabajo.

JD(NY)-13-16  
Brooklyn, NY

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK OFFICE**

**DEEP DISTRIBUTORS OF GREATER NY D/B/A THE  
IMPERIAL SALES, INC.**

**and**

**29-CA-147909**

**UNITED WORKERS OF AMERICA, LOCAL 660**

**DEEP DISTRIBUTORS OF GREATER NY D/B/A THE  
IMPERIAL SALES, INC.**

**and**

**29-CA-157108**

**HENRY HERNANDEZ, AN INDIVIDUAL**

**and**

**DEEP DISTRIBUTORS OF GREATER NY D/B/A THE  
IMPERIAL SALES, INC.**

**and**

**29-RC-146077**

**UNITED WORKERS OF AMERICA, LOCAL 660**

***Henry J. Powell and Emily A. Cabrera, Esqs.,  
for the General Counsel.***

***Saul D. Zabell, Esq. (Zabell & Associates, P.C.),  
Bohemia, NY, for the Respondent.***

***Sheri Preece, Esq. (Bryan C. McCarthy, Esq. & Associates, P.C.)  
Brewster, NY, for the Union.***

**Decision**

**Statement of the Case**

**STEVEN DAVIS, Administrative Law Judge:** Based on charges and amended charges filed by United Workers of America, Local 660 (Union) in Case No. 29-CA-147909, and based on charges and amended charges filed by Henry Hernandez in No. 29-CA-157108, an amended consolidated complaint was issued against Deep Distributors of Greater NY d/b/a The Imperial Sales (Respondent or Employer) on October 30, 2015.<sup>1</sup>

---

<sup>1</sup> The charge, first amended charge and second amended charge in Case No. 29-CA-149709 were filed by the Union on March 10, 12, and August 31, 2015, respectively. The charge, first amended charge, and second amended charge in Case No. 29-CA-157108 were filed by Henry Hernandez on July 31, September 24 and November 3, 2015, respectively.

JD(NY)-13-16

5 The complaint, as amended at the hearing, alleges that the Respondent (a) by its agent Amjad Malik, gave employees the impression that their union activities were under surveillance and (b) by its manager Miller, threatened employees with unspecified reprisals if they selected the Union as their representative; told employees that it would be futile to select the Union as their collective bargaining representative, and threatened employees with discharge if they selected the Union as their representative.

10 It is also alleged that on March 6, 2015, the Respondent discharged Jose Wilfredo Argueta, Jose Martin Torres, and Jose Michel Torres because they joined and assisted the Union and engaged in concerted activities.

15 It is further alleged that in about July, 2015, the Respondent's employees including Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes and Augustin Sabillon, engaged in concerted activities with other employees by filing a lawsuit which alleged that the Respondent was violating the Fair Labor Standards Act (FLSA).

20 It is alleged that on about July 14, 2015, by Tony Bindra, interrogated employees about their involvement in the FLSA lawsuit and threatened them with unspecified reprisals because of their involvement in the filing of that lawsuit.

25 It is additionally alleged that on about July 21, 2015, the Respondent unlawfully implemented new work rules and discipline regarding cell phone use and lateness, and that on that day, the Respondent discharged Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes and Augustin Sabillon because they filed the FLSA lawsuit.

30 Finally, it is alleged that on about December 9, Respondent, by its attorney Saul D. Zabell, while in a Board hearing room (a) threatened employees with legal action in retaliation for participating in a Board hearing and because of their Union activity and (b) threatened to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

35 On October 20, 2015, the Regional Director issued a Report on Objections and Challenges, consolidating for hearing the alleged unfair labor practice cases with objections to the election filed by the Employer. At an election conducted on March 24, 2015, of the 20 eligible voters, 9 votes were cast for the Union and 5 votes were cast against the Union. Five ballots were challenged. The ballots cast by Jose Wilfredo Argueta, Jose Martin Torres and  
40 Jose Michael Torres, the alleged discriminatees in the unfair labor practice case, were challenged by the Employer. The ballots cast by Amjad Malik and Manjit Singh were challenged by the Union.

JD(NY)-13-16

The Respondent's answer, as amended at the hearing, denied the material allegations of the complaint, and a hearing was held before me in Brooklyn, New York on December 9, 11, 21-23, 2015, and January 20, 22, 26-27, 2016.<sup>2</sup>

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following:

### Findings of Fact

#### I. Jurisdiction and Labor Organization Status

The Respondent admitted that from January 1, 2013 to the present, it has been a domestic corporation having an office and place of business at 999 South Oyster Bay Road, Bethpage, New York, and with a former place of business at 60 Gordon Drive, Syosset, New York. It further admits that it has been engaged in the non-retail sale of beauty and appliance and housewares products. The Respondent admits that during the past year, it purchased and received at its combined Bethpage and Syosset, New York facility, goods valued in excess of \$50,000 directly from points outside New York State. The Respondent admits, and I find that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.<sup>3</sup>

The Respondent also admits and I find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

#### II. The Respondent's Hierarchy

Chandeep (Danny) Bindra is the owner of the Respondent. His brother, Tony Bindra, is its general manager. Herbert Miller is the warehouse manager and an admitted statutory supervisor. Miller is in charge of the daily operations of the warehouse. The complaint alleges and the Respondent denies that Amjad Malik is a statutory supervisor or agent.

The Respondent purchases beauty products and electronics and appliances which it stores in its warehouse. Retail stores purchase those products from the Respondent which then ships them to retailers and to on-line purchasers.

The Respondent's approximately 20 warehouse employees pick the orders requested by its customers by locating them on the warehouse shelves and bringing them to the shipping department where they are checked by Miller and then prepared for delivery and sent out. The employees operate fork lift trucks to store and to pick the items.

<sup>2</sup> On February 1, 2016, I granted the General Counsel's motion to quash subpoenas served by the Respondent on certain employees. The Respondent sought to examine them on certain amendments to the complaint made by the General Counsel. My Order granting the motion to quash the subpoenas was received in evidence as G.C. Exhibit 26.

<sup>3</sup> The Respondent argued at the hearing that Deep Distributors of Greater NY and The Imperial Sales, Inc., are separate entities. This claim has no merit. The Respondent amended its answer to admit that Deep Distributors of Greater NY and The Imperial Sales having its facility in Bethpage is a statutory employer.

JD(NY)-13-16

**A. The Alleged Supervisory and Agency Status of Amjad Malik**

Miller is in charge of the electronic and appliances section of the warehouse. Malik is in charge of the beauty and personal items products. Six or seven employees worked in each department.

Employee Jose Torres stated that when he began work in 2011 or 2012, Tony Bindra told him that Malik was his supervisor. Jose Torres and Argueta testified similarly that Malik told them what job they would be performing, and during their employment, gave them daily job assignments. If they were late to work or wanted a day off they called Malik. On those occasions, Malik approved the requests.

Jose Torres testified that about two or three years before the hearing, he saw Malik speak to employee Ramon Muncho but did not know what they said because he was too far away. Immediately thereafter, Muncho told Torres that he was fired. Muncho left the premises and did not return. Similarly, Argueta testified that, about three or four years ago, he saw Malik argue with Jose Ramone Argueta who then left the premises. Argueta asked Ramone what happened and Ramone said that Malik had fired him. The Respondent had no written disciplinary records of any employees and, accordingly, these alleged discharges could not be confirmed with documentary evidence. Employee Javier Reyes stated that he considered Malik as a supervisor because he followed and observed the workers, gave them orders, and worked at the computer in his office.

Employee Marvin Hernandez and Roberto Reyes stated that when Miller was not at the premises Malik was in charge, and, according to Reyes, at those times Malik directed the workers as to their job tasks. Miller testified that when he is not present he does not know who assigns the work.

Argueta testified that in about September, 2014, he was filling an order when Malik told him to do another job. Argueta testified that he did not hear Malik and, apparently, ignored him. Malik warned him that that he would not get any more chances if he made any more mistakes.

The Respondent had no responsive documents to General Counsel's subpoena regarding the supervisory status of Malik. Malik did not testify.

Tony Bindra testified that Malik uses a computer to print the order pick sheets. He is the only employee who has that task because he is the only worker who knows how to use the computer, and read English. Similarly, because of his fluency in English, Malik is the only employee who receives merchandise from delivery trucks. According to Bindra, apart from these duties, Malik has is a warehouse worker with the same responsibilities as the other warehouse employees.

Bindra gave contradictory testimony. He first testified that Malik signed orders to purchase products but then, following an objection by attorney Zabell, testified that he did not. Tony Bindra denied that Malik possessed any supervisory responsibilities. He stated that he has no authority to hire, discharge, or recommended discharge. Bindra conceded that he shares an office with him but later stated that he has no office within the warehouse.

Malik occupies a position of trust. Miller testified that Malik is his "main helper." He is the only employee who has a key to a room, called the blade room, where expensive merchandise



JD(NY)-13-16

is kept. Bindra trusts him with those costly goods, stating that he did not want others to possess a key because items may be missing.

### III. The Union's Organizational Campaign

Employee Henry Hernandez and his co-workers became interested in joining a union, and Hernandez contacted Union agent Wester Fabres. Beginning in early January, 2015, Hernandez and his fellow workers met each week with Fabres, and attended meetings with the Union.

In early January, 2015 Fabres parked his vehicle across the street from the Respondent's shop in direct view of the Respondent's business. The vehicle bore a large flag with the legend "Local 660" prominently displayed on the car.

Employees Javier Reyes, Roberto Reyes, Argueta and Sabillon spoke occasionally with Fabres at his car for a few minutes. Javier Reyes stated that in late February, after speaking with Fabres and entering the building, he heard Miller ask Roberto Reyes "what happened outside."

Marvin Hernandez stated that as he and other employees entered the warehouse through the office, the door was open and he saw Tony Bindra and Miller standing at the window looking outside during the time that Fabres' car was located across the street from the facility.

Manager Miller testified that he saw a car parked across the street from the facility and noticed a banner hanging on the vehicle. He stated that he was not concerned about the car because he did not know if the car was there with respect to the Respondent or the business next door to it.

On February 10, 2015, the Union filed a petition seeking to represent the Respondent's warehouse employees. Thereafter, on February 26, the Respondent and the Union signed a stipulated election agreement setting March 24 as the date for the election.

#### A. Malik's Alleged Surveillance

Jose Michel Torres and Argueta testified that on February 17, as he and Argueta were working, Malik approached and said that they "were part of a union" or "with the Union." The two workers did not reply, and Malik left the area.

Argueta testified on cross examination that he was not given the impression that his union activities were under surveillance. I discount this testimony. The "impression of surveillance" is a legal term. Argueta testified credibly as to the facts which occurred.

Employee Roberto Reyes stated that, following his meetings with Fabres, Miller asked him if he "knew something about the Union." Reyes said that he knew nothing. Miller replied "I think that the one that is hanging out with the Union is Alex [Argueta]."<sup>4</sup>

---

<sup>4</sup> Reyes' testimony that this conversation occurred in December is an obvious error inasmuch as the Union's campaign did not begin until January. Further, Reyes rehabilitated his

Continued

JD(NY)-13-16

**B. The Discharges of Argueta, Jose Michel Torres and Jose Martin Torres**

5 Manager Miller stated that in late January or early February, Tony Bindra told him that there were too many employees because the winter was harsh and "limited how much we could do." Bindra asked him to recommend who to "terminate." They decided that Jose Martin Torres would be discharged because he was a temporary employee who replaced Juan Flores who was caring for his injured son. They also agreed to "terminate" Argueta because of his "safety problems" and to "terminate" Jose Michel Torres because he was the least productive worker.

10 Tony Bindra stated that he saw Jose Michel Torres asleep at work on at least three occasions, the last time being 15 to 20 days before his discharge. However, he did not wake him up because he did not speak to the workers as that was Miller's job. However, Bindra complained to Miller about Torres' sleeping on the job. No written warnings were given to Torres who denied that he received any discipline, and denied sleeping on the job.

15 On March 6, one week after the Respondent signed the election agreement, Miller told Argueta, Michel Torres and Martin Torres that there was "not a lot of work," that work was slow, and they were being sent home but would be called back to work. However, they were not recalled.

20 Argueta testified that work was not light because at that time he unloaded four to five trucks and the Respondent was presenting at a trade show where customers typically place many orders for products. Sabillon testified that he did not know anyone who was laid off because work was slow. In fact, when the three employees were fired, business and work were not slow because he noticed that there was much work, citing the fact that trailers of products were received and were delivered. Jose Michel Torres also denied that work was slow at that time. He noticed that when he left work that orders were being received. Further, Henry Hernandez who continued to work after the three employees were laid off, observed that the Respondent hired one or two new workers following the layoff and after the move to Bethpage. One was a nephew of Roberto Flores.

25 Miller's testimony that the three employees were laid off before the Respondent learned that the Union had filed the election petition is clearly wrong. They were discharged on March 6, 2015. The petition was filed on February 10, 2015 and Tony Bindra admitted receiving it on about that date. Miller's further testimony that perhaps they were laid off before he began seeing the Union's car parked across the street from the facility is equally erroneous. The Union's car was at the Respondent's facility beginning in January, and in his speech to the workers on March 10, Miller told them that the only thing the Union can do is "stand outside." It is reasonable to find that Miller was aware of the Union's presence outside the facility at least four days earlier especially since the Union's car had been periodically parked across the street from the facility periodically for two months.

30 testimony by stating that the remark by Miller was made after the Union appeared on the scene.

JD(NY)-13-16

**C. Reasons for the Selection of Argueta, Jose Martin Torres and Jose Michel Torres****1. Argueta**

5 Bindra stated that Argueta crashed the forklift into a FedEx truck in the old facility in Syosset, breaking its light. According to Bindra he "always was a dangerous guy."

10 Argueta testified that he and other employees often climbed the warehouse shelves in order to retrieve picked orders. They were seen doing so by Tony Bindra, and did not receive any discipline for that activity. In fact, manager Miller testified that Argueta was "kind of reckless," on two occasions climbing the shelves instead of using a ladder. Miller warned him orally but not in writing. Tony Bindra stated that he often saw Argueta "trying to do gymnastics on the ladder."

15 Nevertheless, Argueta was not suspended or discharged and received no written warnings in the four years he worked for the Respondent.

**2. The Torres Brothers**

20 Miller stated that Jose Michel Torres was extremely lazy - the least productive worker who tried to do as little work as possible. He was often absent from work. Nevertheless, he did not issue any written warnings to Michel and did not discipline him in the approximately four years he worked at the Respondent. Further, Miller accepted his recommendation to hire his brother Martin because he needed a worker at that time.

25 Miller testified that when Michel asked him for a job for his brother, he told Michel that there were no openings. Later, when Flores was absent to care for his son, he looked for a temporary replacement until Flores returned. However, he did not testify that he told Michel or his brother that he would be retained only until Flores returned. In fact, the Respondent's records reflect that Flores left work on December 12, 2014 to care for his son and returned on February 17, 2015.

30 Flores performed many tasks. He pulled orders and worked as a handyman, changing light bulbs and fixing the factory doors. In contrast, Jose Martin Torres was employed solely as an order picker.

35 Miller testified that he told Jose Martin Torres when he was hired that he was being hired as a "temporary employee." Miller said that he told Torres that Juan Flores was away from work caring for his child and that when he returned "we'll see how business was, and we would take it from there."

40 Miller's statement concerning Torres' continued work was thus equivocal. He did not definitely say, according to his own testimony, that Martin would be released when Flores returned. Miller held out the possibility that if business was good he would be retained.

45 Miller's testimony is flawed. The Respondent's records establish that Martin Torres was employed by the Respondent on February 17, 2015 when Flores returned to work, and that Martin was not discharged until three weeks later, on March 6.

JD(NY)-13-16

### 3. The Alleged Lack of Work Defense

The Respondent asserts that the three men were laid off for lack of work. Tony Bindra stated that the weather that season was harsh, and sales were down from the previous year. He also testified that following Christmas work is slow.

First, it should be noted that the three men were discharged on March 6, more than two months after Christmas. Their discharge was two weeks after the election petition was filed and one week after the election agreement was signed.

I must note Tony Bindra's contradictory testimony. He first definitively testified on examination by General Counsel that the three men were "terminated... and were not laid off." On examination by attorney Zabell, the following day, he stated that they were "laid off."

The Respondent produced a list of employees all of whom were marked as being "laid off" in the period 2010 to 2015. However, Tony Bindra could not testify definitively as to who was terminated and who was laid off. He stated that when the document was prepared it was "just easier to drag this thing [the term "laid off"] from an Excel program and put it in there." Finally, when asked about the accuracy of the term "laid off" when applied to all the employees on the list, he said "I don't know if it's accurate or not. I'm just saying I don't remember this." Nevertheless, he identified two employees who were laid off in February, 2015 for lack of work: Chris Chiarappa, a buyer and Michael O'Hara, a salesperson. It must be noted that no warehouse workers were laid off or discharged at that time other than the three discharges, Argueta, and the Torres brothers.

Tony Bindra stated that in response to the subpoena's demand for documents which would show the reasons for its determination that there was insufficient work to justify the employment of Argueta, Jose Martin Torres and Jose Michel Torres, the Respondent provided just two documents, identified as G.C. 15 and 16. Bindra stated that the Respondent's purchase of goods were \$17,780,000 in 2015, and \$25,302,520 in 2014. He guessed that one reason was the very cold weather in 2015 and with too many warehouses in Syosset the amount of snow made it impossible to travel between its three warehouses in Syosset. In answer to a leading question from Zabell, Bindra replied that the Respondent could not make deliveries to facilities because of the snow.

Bindra stated that the numbers in G.C. 15 and 16 were based on data that was input in the computer which was derived from purchase orders and slips and other sources. He conceded not having produced purchase orders or purchase documents, saying that there are "thousands of documents and he did not know where they were, adding that if he printed them there would be a "million pieces of paper."

The General Counsel stated that she asked for original books and records - back-up documents and not just the summaries set forth in G.C. 15 and 16. Zabell replied that if back-up documents exist in the form of data in a computer he was under no obligation to compile a report that satisfied the General Counsel. General Counsel noted that the subpoena also demanded electronically maintained documents. Zabell stated that the records no longer exist, but that the "raw data ...exists in an accounting program; "the data from purchase orders exist in

JD(NY)-13-16

a database.... Information does exist in the form of random data in a database that supports the financial information provided.... That data is not decipherable absent the created report. A summary of report existed and it was provided. Counsel now seeks to have Respondent create reports for purposes of this litigation without providing any legal basis to support imposition of such a duty. The creation of documents that do not exist from information that absent such a report is indecipherable exceeds the obligations imposed by the subpoena."

During the hearing, the General Counsel filed a Motion to Impose Sanctions under *Bannon Mills, Inc.*, 146 NLRB 611, 633-634 (1964).<sup>5</sup>

I granted the General Counsel's motion and the requested sanctions. I noted that Federal Rules of Evidence 1006 states that the contents of voluminous writings which cannot conveniently be examined in court may be presented in the form of a summary, but that the originals shall be made available for examination. I ruled that it was the Respondent's obligation to produce the documents. I noted that Zabell stated that the data was available, and if reports had to be created to produce the data they should have been created.

The sanctions which I granted precluded the Respondent from presenting any documentary or testimonial evidence on the subject matter relating to its defense that the three employees were laid off due to a slowdown in business, and that the Respondent was similarly precluded from producing such evidence relating to the financial status of the Respondent's business. I also granted the General Counsel's requested sanction that I draw an adverse inference that the Respondent's financial records, had they been produced, would not support its claim that a downturn in business necessitated the layoff of the three employees.

#### **D. Miller's Meeting with Employees**

Henry Hernandez testified that in March, following the visits of Fabres across the street from the shop, he was speaking to his co-workers when Miller approached and said "let's talk face to face about the Union. Don't be like a girl" or "if you want to talk about the Union, come in front. Don't act like a girl."

Miller testified that he did not hear the employees speaking with each other concerning the Union and did not assume that their conversation related to the Union. However, his pre-trial affidavit stated that he held a meeting, discussed below, with employees because he saw about four employees sitting in the corner hiding behind pallets, talking about "things." He did not know what they were speaking about but told them if they wanted to speak they should "bring it out in the open and we can talk about it."

The next day, on March 10, four days after the three employees were discharged and two weeks before the election, Miller called a meeting of all the employees, in which he said that he would speak about the Union.<sup>6</sup> Employee Sabillon recorded the meeting which was

<sup>5</sup> The Motion, the Respondent's Opposition and certain other documents were received in evidence as G.C. Exhibit 25.

<sup>6</sup> Hernandez testified that the meeting took place in the morning at 9:00 or 10:00 a.m., but  
Continued



JD(NY)-13-16

later transcribed and received in evidence. Miller, who is fluent in Spanish, told the employees, as relevant to the complaint allegations, as follows.

5 You are going to vote for union. This is what will happen. If [it]  
passes. If you vote and you want. And the union gets in. What is  
going to happen is. You will have to strike because we are not  
going to accept that. So, those who vote Yes. I am telling now that  
10 you will lose your jobs because you are going to go out there,  
stand outside with the union. Those who don't vote are going to be  
here, working and, and we will be bringing new people. So, people  
who don't, who vote, and go out there, I am telling you now, if you  
want you can go now, because you will not have a job. We will  
not bring the other. The others are going to. You know what. The  
15 only thing the union can do is to stand outside for. I don't know  
how to say it in Spanish. But we will bring new people because I  
know that not all of you will vote. I have 100 percent that not all  
are going to vote. So, those who do vote, I am telling you as of  
now, if you want. You are not coming back in here because you  
will lose your job. Because we will fight this.... I feel betrayed  
20 because I always treated everyone right. Because prior to my  
getting here you did not take coffee break or take anything. When  
I got here I changed everything.... I give you a lot. How do you  
say that? Ah. Freedom. The phones I don't say anything. You  
come wearing shorts, wearing tennis, I don't say anything. Okay. If  
25 you want change, careful what you ask for. Okay. Because a lot  
will change. But I am telling you right now, those who vote for the  
union, you will lose your job. Because we will fight it until the end.  
And all the union can do, like I said, is to stand outside. .... You left  
for months. Even Alex when his sister died left for months. And we  
30 always took him back.... I don't understand what happened with  
this union thing, but now I see Alex and Victor out there with them.  
But I don't know what is going on. You know more than I do.  
Because I know you were hanging with Michel and they told you. I  
was not there but I am 100 percent that he....  
35 But if you're going to start work for us or trouble for us, I don't  
want you here. You. I have treated you right the whole time. If you  
want me to treat you poorly, you shall see. Okay. But I am telling  
you one, one thing, those who. The union is never getting in  
because we will fight. You shall see if you can go some two, three  
40 weeks without pay. We will bring other people and it will hurt them  
for one week, two weeks, but they will learn. Just like you learned,  
like you learned everything. The new people will come and learn  
the job.... If you are not happy, leave. But stop, don't bring  
problems for me because I am not going to be happy and if I am  
45 not happy you will not be happy.....

50 his affidavit stated that it occurred after lunch, at about 11:00 a.m. This minor inconsistency is  
immaterial. There is no dispute that the meeting occurred, as supported by the recording of it.

JD(NY)-13-16

[At this point an unidentified employee told Miller that he [Miller], as a manager must speak for the workers. Miller replied] Exactly. Right. I am always doing that. That is why I can get everything I have gotten for you. So you can take the break. There was no coffee break here before.... If you are not happy, leave, leave.... When you were leaving you asked me, when you called me to come back I brought you back. You wanted to bring your brother and your two brothers were brought in. When you need something you go to Tony and helps you.... I gave your brother work because of you. So, everyone it's like a family. .... This started from nothing. I don't know where this started. That is the problem. We were fine here. Someone is putting things in your head but if you want it, if you don't believe me, do what you got to do and do what you gotta do. You'll see what happens.

It should be noted that the transcript of the recorded meeting contradicts Miller's trial testimony that he did not tell the workers that (a) a vote for the Union will cause a strike (b) the Respondent would not accept the Union (c) those who voted for the Union will lose their jobs or will have to stand outside while those who voted against it will be working (d) those who vote for the union could leave now because they would not have a job (e) the Respondent will bring in new workers for those who vote for the union and (f) those who vote for the Union will not be returning.

Rather, Miller testified flatly that the only question he recalled asking is if the workers knew how much they would have to pay in union dues.

During the meeting, Miller asked, whether in "your country" employees were paid for their work. One worker said they were paid for their work. Miller replied that they were paid because they were in that country. He added that "you have all the rights here. I know what the union is telling you. But, no they don't have good social. What are they going to do for you in the union? They cannot do." An employee answered that his wife "has no papers" and she was paid for the holiday.

Henry Hernandez testified that Miller said at the meeting that the Union could do nothing for the workers because they did not have a "good social security." Employee Roberto Reyes stated that at a meeting, Miller told the workers that if they did not have "papers, social security," the Union would do nothing for them.

Following the playing of the recording of the meeting, the Respondent amended its answer to admit that on about March 9, Miller (a) threatened employees with unspecified reprisals if they selected the Union as their collective-bargaining representative (b) told employees that it would be futile to select the Union as their collective-bargaining representative and (c) threatened employees with discharge if they selected the Union as their collective-bargaining representative.

I reaffirm my ruling that the Respondent's later claim that the tape was inaccurate has no merit. Zabell was invited to produce any evidence to support that claim. He did not do so.<sup>7</sup>

---

<sup>7</sup> Zabell first claimed that the recordings were not full and complete. He was given a copy of Continued



JD(NY)-13-16

**E. The FLSA Lawsuit and the Events following the Election**

5 The election was held on March 24. Henry Hernandez and other employees stated that following the election they continued to meet with Union agent Fabres. Their conversations included their concern that they had not been paid for the overtime hours they worked. Fabres said that he would obtain an attorney to speak with them about that issue, and later brought them to meet an attorney who filed the lawsuit.

10 A federal lawsuit was filed on about July 6, 2015. Tony Bindra admitted receiving the lawsuit on about July 8. The plaintiffs were listed as Jose Reyes, Jairo Bonilla, Augustin Sabillon, Javier Reyes, Selvin Vasquez, Marvin Hernandez, Henry Hernandez, Jose Olan Amador, Armando Lazo, Valerio Baquedano, Jose Michel Torres, Jose Argueta, and Noel Efrain Castro. The complaint stated the residence of each plaintiff and alleged that each employee worked on  
15 weekends and was not paid at the overtime rate for such work pursuant to the FLSA and the New York Labor Law.

20 Tony Bindra admitted that, upon receiving the lawsuit, he was "surprised and disappointed" and for that reason wanted to meet with the workers. He was surprised because most of the information contained therein was incorrect, including the employees' addresses and their claim that they worked on the weekends. He wanted to make certain that the suit was their own product. Bindra denied discriminating against employees because they filed the lawsuit.

25 Employee Roberto Reyes testified that on July 15 he was called into Miller's office where Miller and Tony Bindra spoke to him alone. Bindra showed him the court papers and asked if he knew anything about the attorney who filed the FLSA suit. Reyes denied any knowledge of the matter. Bindra challenged him, saying that his name was the first one listed. Reyes repeated that he knew nothing. Bindra told him to return to work and said that he would meet one-by-one  
30 with the workers.

Shortly thereafter, a meeting was held at which Tony Bindra spoke to the workers. His words in English were translated into Spanish by Miller. Sabillon recorded the meeting.

35  
40  
45 the recordings and transcripts thereof, which were also received in evidence. The Respondent had already amended its answer following Zabell's statement that "based upon the testimony that just came out, it appears that I'm going to have to amend my answer somewhat, to amend the pleading to comport to the testimony....It will involve me reviewing my notes, reviewing the tape but I do believe it will streamline the process today." After a one hour break, Zabell  
50 amended the Respondent's answer to admit the allegations set forth above.

JD(NY)-13-16

Bindra began the meeting by telling the workers that he was served with the lawsuit and read all the employees' names listed, asking them where they lived and comparing their responses with the information in the lawsuit. He said that "all these guys' names are here. They are all suing me." He noted that the suit alleges that he has not paid them for work performed on weekends. Bindra told the men that they never worked on weekends. He told them that "now I have to defend myself," adding "so now the question is this. We are fighting or we are not fighting? I didn't pay you or did I not pay you? That's the question."

Bindra asked the employees if they were still intent on pursuing the lawsuit. At hearing, Bindra explained that the men agreed that their statements in the suit were false, that they did not work on the weekends and that they no longer wished to pursue the suit. However, the transcript of the meeting does not support a finding that the employees admitted that their allegations in the suit were untrue.

#### **F. The Implementation of New Work Rules and Discipline Imposed**

One week after Bindra's meeting, on July 21, 2015, the Respondent implemented an employee Code of Conduct. This was the first time that the Respondent implemented written work rules of any type. It provided as follows:

#### **Employee Code of Conduct**

##### **Time and Attendance Policy**

Employee lateness interferes with the company's business operations. All employees are required to report to work on time. The scheduled start time for employees is 8:00 am. Any employee who signs in later than 8:05 will be subject to discipline. Consistent with this policy, employees who report to work late will receive a disciplinary warning. If an employee persists in being late, and they accumulate 3 unexcused incidents of lateness during a twelve month rolling time period, they will be subject to termination. There are no exceptions to this rule.

##### **Warehouse Personnel**

The company adheres to all laws and regulations regarding worker and workplace safety. Consistent with this practice, no employee working in the company warehouse will be permitted to utilize their personal cell and/or smart phone, or any other non-company issued electronic device. This includes the operation of such devices with headphones and/or other hands-free components. Any violation of this policy will result in the immediate imposition of discipline, up to and including termination. Cell phone bins will be provided as a convenience for employees to store their cell phones though employees are requested to leave their cell phones at home. Employees who utilize their cell phone during work hours will be disciplined up to and including termination.

JD(NY)-13-16

5 The form had a place for the employee to sign that he acknowledged and agreed with the policies. Employees testified that they made and received cell phone calls during working hours, they used their headphones while working, and that the Respondent's supervisors saw them doing so. None of them was disciplined for such conduct. Indeed, Tony Bindra testified that the warehouse workers "always" wore headsets. He stated that he "always told them not to use the headphones but they never listen."

10 Tony Bindra testified that he implemented the cell phone policy because of the dangerous nature of the warehouse environment: forklift trucks moving back and forth creating noise while employees wore headphones limiting their ability to hear the trucks. His concern in implementing the time and attendance policy was that the Respondent was losing money at that time and he wanted employees to come to work on time. It must be noted that subpoenaed time records of all the employees were not produced.

15 It is undisputed that prior to the issuance of these rules the Respondent had not issued any written workplace rules and procedures.

20 Bindra stated that he began work on the new policy at about the time the Respondent moved to its new Bethpage facility in mid-June, 2015 when the first draft of the policy was created. He stated that he was served with the FLSA suit one month later on July 13. His intent in instituting the new rules was that he wanted the work to be performed more efficiently and safely in the new location. Further, forklift trucks were used more often in Bethpage than in  
25 Syosset because it was a bigger location with more room to maneuver the machines. In Syosset, dollies were used in the smaller warehouse aisles. Nevertheless, notwithstanding the use of forklifts in Syosset, no written rules were implemented there concerning the use of cellphones or headphones.

30 Respondent's witness Aldo Hernandez, a paralegal at attorney Zabell's law firm, testified and produced documentary evidence that the new cellphone policy and the new time and attendance policy was last edited on were last edited in Zabell's office on June 18, and July 10, 2015, respectively.

35 On July 21, a payday, Mena, a payroll employee, told the employees that they had to sign the Employee Code of Conduct which was written in English and Spanish.

40 Five employees, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon refused to sign it. Mena called Miller over and he said that the employees must sign it. They refused. Tony Bindra told them that that was their last day of work. They then were given their last pay check and they left the premises.

45 Thus, the Respondent terminated five long term employees solely because they refused to sign the new attendance and cell phone policy. It must be observed that the five discharges had been employed for years by the Respondent without their being disciplined for any reason. Sabillon began work in October, 2010, Roberto Reyes started work in about April, 2011, Marvin Hernandez became employed in about 2011, and Henry Hernandez and Javier Reyes began work in about March, 2014.

50 Tony Bindra testified that all of the Respondent's employees signed the new policy except the five discharges. Roberto Reyes and Sabillon also stated that those employees who signed the work rules retained their jobs. However, in response to the General Counsel's

JD(NY)-13-16

subpoena which demanded all the signed policies, only nine were produced notwithstanding that, according to the July, 2015 payroll, at least 26 warehouse workers were employed at that time. There was no evidence that other employees who may have not signed the policy were discharged at that time. Thus, although Bindra and two employees testified that others who signed the forms retained their jobs, there was no documentary evidence, the best evidence, to support that claim.

The complaint alleges that the Respondent implemented the "new work rules and discipline regarding cell phone use and lateness and discharged the five employees because they filed the FLSA lawsuit in early July. Tony Bindra admitted receiving the lawsuit on July 13.

Miller testified that the Respondent always had a rule that cell phone use was prohibited, but it was enforced, for safety reasons, only when the facility moved from Bethpage to Syosset in late May, 2015. Miller stated that from late May through July 21, when the new policy was introduced, a period of about seven weeks, the employees worked "with these pieces of equipment running around in the warehouse ... when they were wearing their headphones, and [!] said nothing." Miller stated that when he saw an employee using a cell phone he would "yell" – a form of warning that they should not be using their phone.

Miller testified that in March, 2015, if an employee was late there was no written rule regarding any consequence for his lateness. The Respondent instituted the attendance policy because many employees were absent from work frequently. It decided to "tighten" the policy, which, according to Miller, was always in effect but not enforced. He conceded that no one was discharged for being late.

Miller testified further that prior to the move to Bethpage in late May, he told the workers that, once the facility moves, no one would be permitted to use their cell phones since the new facility would be bigger and have more machines. He explained that the rule was not implemented until July because, at first, all the workers were "on board" with the new rule, but then "just got lax and began falling back in the old pattern again."

Tony Bindra stated that the employees were told that if they did not sign the new policy they would be fired, but if they signed they could retain their jobs. In contrast, the employees stated that they were not told that they would be discharged if they did not sign the policy.

Bindra also stated that he told all the workers to put their cell phones in a cubby which he provided and not use their headphones. They told him that they would not sign the policy because they wanted to continue to use their cell phones and headphones. They were discharged for their refusal to sign the policy.

As set forth above, Miller told the employees on March 10, four months before the implementation of the new rules, that he felt betrayed "because I always treated everyone right....I give you a lot ... freedom. The phones I don't say anything. If you want change, careful what you ask for. Okay. Because a lot will change....If you are not happy, leave. But stop, don't bring problems for me because I am not going to be happy and if I am not happy you will not be happy.... Someone is putting things in your head but if you want it, if you don't believe me, do what you got to do... You'll see what happens."

JD(NY)-13-16

5 The employees testified that they understood that they were supposed to report to work on time and certain employees stated that they knew that they could be disciplined or discharged if they were late often. The Respondent argues that these were work rules that were in place, were understood by the workers and, accordingly, the written implementation of these rules was just a continuation of rules the workers understood and were nothing new.

#### G. The Alleged Threats Made in the Hearing Room on December 9

10 Union president Gilberto Mendoza stated that as he stood at the doorway to the hearing room he saw Zabell enter the hearing room and say "immigration is here" and then walked inside the room. At that time, the employees were seated in the back row of the room near the door which was open. Mendoza added that Zabell was not speaking to anyone when he made that comment. A few minutes later he then heard Zabell point to the workers and say "they are  
15 not going to get a penny from my client. This is a waste of time. They are a bunch of immigrants...if they get up to the stand and give a statement they will be committing perjury so I'm going to take it to the grand jury so they can be deported." He also said that he would call the Immigration Service.<sup>8</sup> Mendoza said that the witnesses were Spanish speakers but that  
20 some understood English.

General Counsel Powell told Zabell to cease making such accusations.

25 The employees testified as to what they heard Zabell say. Their knowledge of English is admittedly limited. However, they credibly testified as to what they heard and that they understood the words Zabell uttered.

30 Argueta testified that he does not fully understand English but that he understands a little English. While testifying in cross-examination through an interpreter he understandably stated that he did not understand Zabell's words as they "exit [his] mouth."

35 Argueta first testified that he was at the elevator with employee Michel Torres when they observed Zabell arriving for the hearing. He heard Zabell speaking to his clients concerning "immigration," and remarking that he was going to "report us to Immigration." Argueta then testified that later, when he was in the hearing room with his co-workers, he heard Zabell say that he would report them to Immigration and that he was not going to pay the workers "not even a penny." He heard Powell tell Zabell three times to "stop."

40 It must be noted that Argueta made two errors in his testimony. He testified that he heard Zabell's comments in hearing room number 2 during which time the administrative law judge was present. In fact, the alleged comments were made in a different hearing room where I was not present when Zabell allegedly made the comments testified to. These errors do not  
45

---

50 <sup>8</sup> Mendoza's affidavit stated that the administrative law judge was present when Zabell made these comments. I stated on the record that I was not present during this incident. Mendoza admitted that he was confused by another incident in which Zabell was yelling regarding Mendoza's presence at which I was present.



JD(NY)-13-16

undermine his testimony, the most important aspect of which was the comments made by Zabell. Those comments were corroborated by other employee witnesses and I credit them.

5 Javier Reyes testified that Zabell pointed to the workers. Although Reyes gave his testimony through a Spanish interpreter, he stated, in English, that "he report with immigration," and the workers would not get a penny. He stated that he is able to read and understand 35% of what is written and spoken in English.

10 Roberto Reyes stated that he did not understand what Zabell said but understood that Powell told him three times to stop. He testified that no one translated what Zabell said, but he believed, at that time, based on Zabell's pointing to him that he "was calling me a criminal."

15 Henry Hernandez, despite that he testified through a Spanish interpreter, testified in English as to what he heard. He stated, in English, that "report to immigration and like penny or something." He credibly and honestly stated that he does not understand much but he understands a little English. He testified that on December 9, Zabell pointed to all the employees sitting in the rear of the hearing room, and screamed at them, saying that he would report them to "immigration" and that the Respondent was not going to pay a penny. General Counsel Powell told him several times to stop. Prior to that time, Zabell was speaking to Powell.

20 Fabres testified that on December 9, he and the employees were sitting on a bench in the rear of hearing room number 3. Before the hearing began, he saw Zabell speaking to General Counsel Cabrera in the hallway outside the hearing room. The door to the hearing room was open and is nearby the bench they sat on. Fabres testified that he heard Zabell raise his voice, yelling, commenting that "they are all illegal undocumented." He said that he was going to call the Immigration Service and have them deported. Cabrera asked Zabell if he wanted to make those comments on the record. The employees looked at Fabres and asked what was happening. Fabres told them to be calm, telling them that Zabell made a comment about the Immigration Service.

35 Fabres testified that later, as he sat in the rear of courtroom 3 with the employees, he observed General Counsel Powell approach Zabell who was seated at counsel's table in the front of the room. Fabres could not hear their conversation since they spoke quietly, but then Zabell raised his voice, shouting that if the employees testified they would be committing perjury, and he would report them to the Immigration Service. Zabell also mentioned a Supreme Court case and pointed at the workers, saying that they would "not receive a penny." Fabres heard Powell telling Zabell in a loud voice to "stop, stop, stop."<sup>9</sup>

45 Danny Bindra testified that as he and Zabell exited the elevator at the hearing-room floor and walking down the hallway toward the hearing room he asked Zabell whether the

---

50 <sup>9</sup> Fabres' pre-trial affidavit stated that those conversations occurred on December 16. At hearing Fabres testified that that date was inaccurate due to a mistake. The mistake is immaterial and does not undermine his testimony which is supported by employee witnesses, that the conversations occurred on December 9.

JD(NY)-13-16

immigration status of the warehouse employees had an effect on this case. Zabell replied that if they were "illegal" they can be deported but it is very unlikely that that would occur because the "government doesn't do it." Bindra denied hearing Zabell say that "immigration is here."

5 Bindra also testified that, prior to the opening of the hearing, he overheard General Counsel Powell and Zabell speak about the case. Zabell, speaking in a conversational voice, but not yelling or speaking loudly, mentioned the name of a case to Powell, adding that pursuant to that decision if the employees were undocumented they "can't get a penny out of it." He did  
10 not observe that Powell was upset at Zabell's mention of their allegedly illegal status. Bindra conceded that some of the employees were at the benches in the rear of the hearing room.

Bindra noted that at that time, Zabell said that if the witnesses give false testimony under the penalty of perjury, such perjured testimony could affect their legal status if they apply for  
15 citizenship. Zabell said that they would be giving false testimony because he had a sworn statement from them. Bindra denied hearing Zabell say that he would have the employees arrested or that he would go to a grand jury and report them, and denied mentioning immigration.

## 20 Analysis and Discussion

### Credibility Findings

25 I credit the testimony of the General Counsel's employee witnesses. Their testimony about conversations with the Respondent's representatives were mutually corroborative. They testified in a forthright, believable manner. Although their primary language was Spanish and they testified through an interpreter, they did understand, to some degree, spoken English. Indeed, they testified in English concerning certain statements they heard in English.

30 I discount their testimony concerning legal terms asked by Zabell such as whether the Respondent told them that it would be futile to seek union representation. Such improper questions, particularly since the Respondent had already admitted such an allegation, was beyond their limited comprehension of those terms. Further, minor errors in their testimony or in  
35 their pre-trial affidavits or recollection in which of two hearing rooms Zabell threatened them do not impair their testimony in any way.

40 I cannot find that the Respondent's witnesses gave truthful testimony in important areas of their recitations. Thus, Miller denied material parts of his March 10 meeting with the workers when the recording of that meeting clearly showed that he made those statements. That recording, and the Respondent's implicit acknowledgement that Miller was untruthful in denying the statements he made, led the Respondent to change its answer to admit that his threats and  
45 statements, preserved in the recording, were made.

Further, Miller first stated that he could not hear what occurred during the election confrontation but then, upon recall by Zabell, his memory improved to the extent that he heard the precise words uttered.

50 Tony Bindra's testimony was extremely evasive and not believable. He first stated that he did not own Deep Distributors but then admitted that he owned that corporation. He first



JD(NY)-13-16

5 stated that he did not work for Deep Distributors but later stated that he did. Incredibly, Tony Bindra could not admit that his brother Danny owned Deep Distributors. When asked whether he had any independent knowledge concerning whether Danny owns Deep Distributors, he incredulously answered "I don't know what you mean knowledge, you know. How would I get the knowledge? I don't know."

10 When asked whether the Respondent has contracts, Tony Bindra, the owner, general manager and "overseer of everything in the company" incredibly testified "what is a contract. I don't know what you mean by a contract... I don't understand what contract means. Contract for me is buying a house." Nevertheless, he admitted signing contracts for the purchase of forklift machines, and with UPS for the shipping and delivery of its products, and further conceded that he and Danny are responsible for signing all the Respondent's contracts.

15 He first testified that Malik signed purchase orders but then said that he did not. He first testified that the five employees were discharged but later stated, in questioning by Zabell following a day's break, that they were laid off and not discharged.

20 Danny Bindra testified that although he was present in the hearing room during Zabell's threats to employees he did not hear General Counsel Powell's entreaties to Zabell to cease his comments. Employees gave credited testimony that they were present in the hearing room at the same time and heard Powell warn Zabell to stop.

#### 25 **Malik's Supervisory Status and the Impression of Surveillance**

The complaint alleges that employees' were given the impression that their union activities were under surveillance by the Respondent's supervisor Malik.

30 The complaint alleges that Malik is the Respondent's supervisor and agent. Section 2(11) of the Act defines a statutory supervisor has any individual having the authority, as relevant here, to discharge, or discipline employees, or responsibly to direct them.

35 The exercise of any of the above responsibilities is sufficient to vest any person with the status of a statutory supervisor. As set forth above, Malik is Miller's "main helper." Jose Torres credibly testified that when he began work Tony Bindra told him that Malik was his supervisor, and that he and Argueta testified that Malik gave them daily assignments. He also approved their requests for leave. There was also testimony that when warehouse manager Miller was absent, Malik was in charge of the facility.

40 Although Miller testified that no employee reports to Malik, the evidence is clear that the Respondent's large facility and large number of products are divided into two areas: beauty supplies and housewares and appliances. There was credible evidence that Miller and Malik are each in charge of the approximately six employees in those separate areas.

45 Inasmuch as there is much work to perform in each area, it is entirely reasonable that Miller and Malik each exercise the power to assign employees to work in his own area. Thus, employees credibly testified that Malik assigns them work to do, picking orders and receiving items in the beauty supplies area. It appears that Miller exercises his own duties in the housewares and appliance area. Accordingly, I find that Malik has the authority, which he has exercised, of responsibly directing employees in their work. *Marquette*  
50 *Transportation/Bluegrass Marine*, 346 NLRB 543, 552 (2006).

JD(NY)-13-16

In addition, two employees, Jose Torres and Argueta, credibly testified that they were told by two other employees that they had just been discharged by Malik. The two discharges did not return to work thereafter. Further, Argueta stated that he received an oral warning from Malik who warned him that he would not receive any more chances if he made another mistake.

Moreover, Malik occupies a position of trust. He is the only employee who has access to the blade room where the most expensive merchandise is stored. He also prints the work orders.

Inasmuch as Malik did not testify no evidence was received from the person at issue. Nevertheless, it is the burden of the party claiming that the person is a statutory supervisor, the General Counsel, to prove that he possesses such status.

I find that General Counsels have met their burden. The evidence is clear that Malik is a statutory supervisor. If it is ultimately decided that Malik is not a statutory supervisor, I find that he is an agent of the Respondent. Malik was placed in a position of trust having access to a room containing expensive merchandise in which no other employee was permitted to enter. Inasmuch as he worked with employees who he assigned work to, it is clear that they would have reason to believe that he spoke and acted for management.

"The Board's test for determining whether an employer has created an impression of surveillance is whether the employee[s] would reasonably assume from the statement in question that [their] union activities had been placed under surveillance." *Grouse Mountain Lodge*, 333 NLRB 1322, 1322 (2001). The Board further stated that "employees should be free to participate in union organizing campaigns without the fear that members of management are "peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." 333 NLRB at 1323.

I credit the testimony of Jose Michel Torres and Argueta who stated that on February 17, Malik told them that they were "part of a union" or "with the Union." Torres and Argueta had not made their union support known to the Respondent. Their activities consisted of meeting with Union agents. Malik's comments made them reasonably assume that their union activities were kept under surveillance and therefore violated Section 8(a)(1) of the Act.

#### **The Discharges of Argueta, Jose Martin Torres and Jose Michel Torres**

The complaint alleges that on March 6, 2015, the Respondent discharged Jose Wilfredo Argueta, Jose Martin Torres, and Jose Michel Torres because they joined and assisted the Union and engaged in concerted activities. The Respondent argues that they were laid off for lack of work, and were selected because of their misconduct.

#### **The General Counsel's Prima Facie Case**

Pursuant to the Board's decision in *Wright Line*, 251 NLRB 1083 (1980) in cases alleging a violation of Section 8(a)(3) and (1), where motivation is at issue, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. The General Counsel may meet this burden by showing that (a) the employee engaged in union or other protected activity (b) the employer knew of such activity, and (c) the employer harbored animosity towards the union or other protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143,

JD(NY)-13-16

slip op. at 3-4 (2011); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. *Brink's, Inc.*, 360 NLRB No. 136, slip op. at 1 fn. 3 (2014). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorrain*, above.

Jose Michel Torres and Argueta gave credible testimony that they attended Union meetings and that they greeted Union agent Fabres at his car in front of the facility. There could be no doubt as to Fabres' purpose since his car bore a large sign with the name of the Union. In fact, Miller said that he did not know whether the car was there for the Respondent or the business next door. Clearly, Miller possessed knowledge, or at least a suspicion, that the Union was present in behalf of the Respondent's employees.

I also find that the Respondent possessed knowledge of the Union activities of the three men. As set forth above, I have found that Malik told Jose Michel Torres and Argueta that they were "part of a union" or "with the Union." Malik did not testify and therefore their testimony is unrebutted.

I credit the testimony of Roberto Reyes who stated that Miller asked him if he "knew something about the union." Reyes denied knowing anything about the Union. Miller replied "I think that the one that is hanging out with the Union is Alex [Argueta]." Miller did not deny this remark attributed to him, and therefore it stands unrebutted.

There was no direct evidence that the Respondent knew that Jose Martin Torres engaged in union activities or that the Respondent was aware of them. However, the General Counsel argues that he was discharged because he was the brother of Jose Michel Torres who had recommended him for hire.

The Board has held that the discharge of a person in order to retaliate against his relative who was a union activist is unlawful. *Thorgron Tool & Molding*, 312 NLRB 628, 631 (1993); *Carrizo Mfg. Co.*, 214 NLRB 171, 181 (1974). Here, I find that the General Counsels have met their burden of proving that the union activities of Jose Michel Torres was a motivating factor in the Respondent's decision to discharge his brother Jose Martin Torres. *T.M.I.*, 306 NLRB 499, 503 (1992).

Thus, I find that, as in *T.M.I.*, the timing of the discharges of the three men, coming only four days before Miller's strongly anti-union message to the remaining workers, including admitted threats of discharge, and only two weeks after Argueta and Jose Michel Torres were identified by Malik as being "part of the Union," supports a finding, which I make, that the three men were discharged because of their union activity.

I further find that the Respondent harbored animosity toward the Union and the union activities of the dischargees. Miller's strongly anti-union comments to all the employees only four days after their discharges forcefully conveyed the message that union supporters would lose their jobs. It also confirmed to the workers that he had been "betrayed" by their interest in the Union.

Miller specifically referred to Argueta as being "out there with them" and mentioned that "because I know that you were hanging with Michel."

In addition, the Respondent's creation of the impression of surveillance, found above, which occurred before the three employees were discharged, establishes that it had animus

JD(NY)-13-16

toward their union activities. *DPI New England*, 354 NLRB 849, 868 (2009); *Diversified Chemicals Corp.*, 231 NLRB 982, 993 (1977).

Further, I cannot find, as set forth below, that the Respondent has met its burden of proving that it possessed a reasonable basis for discharging the three men for their misconduct or that it has established its economic defense of lack of work. *T.M.I.*, 306 NLRB at 504-505.

I accordingly find that the General Counsel has proven that the union activities of Argueta and Jose Michel Torres were motivating factors in their discharge. I also find that Jose Martin Torres was discharged because he was the relative of Jose Michel Torres in retaliation for the union activities of Jose Michel Torres. *Wright Line, Inc.*, above.

The burden now shifts to the Respondent to prove that it would have discharged the three men even in the absence of their union activity. *Wright Line*, above.

### **The Respondent's Defense**

#### **Lack of Work**

The Respondent argues that the three men were discharged for lack of work. It further asserts that it chose them because of their poor work or misconduct. Neither defense has merit.

The General Counsel subpoenaed detailed financial records from the Respondent which would prove or disprove its economic defense. As set forth above, only two limited documents which summarized certain sales or purchase orders was produced.

As set forth above, Tony Bindra gave inconsistent and contradictory testimony as to whether the three employees were laid off or discharged. The Respondent failed to provide original books and records to support the figures in the two summaries it produced. Those "back-up" documents were available in the form of data located in the Respondent's computer which Zabell maintained he was under no obligation to produce because it must be organized into a report. However, the General Counsel's subpoena called for the production of electronically maintained documents. As noted above I granted the General Counsel's motion for sanctions under *Bannon Mills*, precluding the Respondent from producing evidence in support of its lack of work defense.

Even aside from the documents, Bindra's testimony that the Respondent's work slows after Christmas is undermined by the fact that the discharges occurred more than two months after Christmas, and by the fact that employees testified that at the time of the discharges they were busy at work.

### **The Selection of the Three Employees**

#### **Argueta and Jose Michel Torres**

The Respondent selected Argueta for discharge because he was "dangerous" -- climbing shelves and not using a ladder. Michel Torres was chosen because he allegedly slept while at work and was lazy.

Argueta admitted crashing his forklift truck into a FedEx truck breaking its light and also conceded that he climbed the shelves, being seen by Tony Bindra and Miller. No discipline was issued for these infractions but Argueta admitted being warned by Malik for ignoring an order.

JD(NY)-13-16

Incredibly, Tony Bindra testified that he saw Michel Torres asleep at work at least 3 times, the last being two to three weeks before he was discharged. However, Bindra did not wake him up and no discipline was given to him for this gross misconduct.

I find that the Respondent condoned the alleged misconduct of Argueta and Jose Michel Torres until an opportunity arose to discharge them for their union activities. The evidence is clear that the Respondent would have continued them in its employ, as it had for the four years each had been working for it, had it not been for the Union's appearance on the scene.

#### **Jose Martin Torres**

Miller's testimony that Jose Martin Torres was hired only as a replacement for Juan Flores lacks merit. The Respondent's records establish that Martin continued to work for three weeks, from February 17, 2015 when Flores returned, until his discharge on March 6. This completely undermines Miller's testimony that Martin was scheduled to be discharged upon Flores' return to work.

Moreover, Miller did not testify that he told Michel or his brother that he would be retained only until Flores returned. Significantly Miller's testimony that he told Torres that Juan Flores was away from work caring for his child and that when he returned "we'll see how business was, and we would take it from there" held out the possibility that if business was good he would be retained. This was not an unequivocal declaration to Martin that he would be replaced upon Flores' return to work.

Further, the evidence also establishes that Flores worked as a handyman in addition to picking orders. Accordingly, Martin Torres may have replaced Flores regarding his order picking work but did not substitute for his repair work. Accordingly, they did different types of work and it appears that Martin Torres could have been retained to perform the type of work he did even upon Flores' return to work.

The reason given for Martin's discharge, that he was hired only as a replacement for Flores until his return to work was false. The evidence establishes that Martin continued to be employed for three weeks after Flores' return. He was discharged only when the opportunity arose to discharge him for the union activities of his brother.

#### **Conclusion**

I accordingly find and conclude that the Respondent has not proven that it would have discharged Jose Wilfredo Argueta, Jose Martin Torres or Jose Michael Torres even in the absence of their union activities. *Wright Line, Inc.*, above.

#### **Employees were Threatened with Unspecified Reprisals and Discharge; Futility of Selecting the Union**

The complaint alleges that the Respondent, by Miller, threatened employees with unspecified reprisals if they selected the Union as their representative; told employees that it would be futile to select the Union as their collective bargaining represented, and threatened employees with discharge if they selected the Union as their representative.



JD(NY)-13-16

Miller denied making these statements. As set forth above, following the playing of the recorded meeting at which he spoke on March 10, set forth above, Miller admitted that it was his voice making these statements. The Respondent then amended its answer to admit the complaint allegations that on March 10, the Respondent, by Miller threatened employees with unspecified reprisals, told employees that it would be futile to select the Union, and threatened employees with discharge if they selected the Union as their collective bargaining representative.

I accordingly find that these admitted threats violated Section 8(a)(1) of the Act.

#### **Interrogation of Employees and Threats of Unspecified Reprisals Concerning Employees' Involvement with the FLSA Suit**

On July 8, 2015, Tony Bindra received a federal lawsuit filed by the Respondent's employees including Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes and Augustin Sabillon. The suit alleged that the Respondent violated the FLSA by not paying, inter alia, overtime wages and other payments required by law.

The complaint alleges that in July, 2015, by Tony Bindra, interrogated employees about their involvement in a FLSA lawsuit and threatened them with unspecified reprisals because of their involvement in the filing of a FLSA lawsuit.

The Board has long held that the filing of a lawsuit by a group of employees is protected activity. See *D. R. Horton*, 357 NLRB No. 184, slip op. at 2 fn. 4 (2012), and cases cited therein; *200 E. 81<sup>st</sup> Rest. Corp.*, 362 NLRB No. 152 (2015)

#### **The Interrogation of Reyes**

As set forth above, on July 15, Miller and Tony Bindra called Reyes into an office where they spoke to him alone. Bindra showed him the FLSA lawsuit and asked him if he knew anything about the attorney who filed the FLSA suit. Bindra pressed him, saying that his name is the first one listed. Reyes repeated that he knew nothing. He was told to return to work.

Following that private meeting, Bindra spoke at a meeting with employees regarding the suit, as set forth above. In that conversation, Bindra challenged them, asking them if the information concerning their residences listed in the suit was correct. He accused the men of suing him. He contradicted the suit's allegations that the men worked on weekends, asking detailed questions about when they worked. He then asked the workers if they still intended to pursue the suit, ending the conversation with the remark that "now the question is this. We are fighting or we are not fighting? I didn't pay you or did I not pay you? That's the question."

The Respondent defends the General Counsel's allegations by asserting that the employees agreed that the suit was without merit and that they wanted to abandon it. The recorded transcription contains no such statements.

In this respect I reject the Respondent's argument that a letter dated January 3, 2016 from the attorney who filed the lawsuit proves that the allegations made therein are false. The letter requested Zabell's consent to file an amended complaint, stating that the factual allegations concerning the employees' hours worked and lunch breaks in the complaint were not accurate. He sought to delete the allegations concerning the lunch breaks and to present a more accurate representation of the hours worked by each employee. Thus, at most, the letter represents that certain allegations contained in the lawsuit were inaccurate, not the entire

JD(NY)-13-16

lawsuit. Further, the letter states that the attorney simply wished to change the employees' hours worked, not to delete that part of the lawsuit.

Accordingly, the Respondent's argument that the FLSA lawsuit was filed in "bad faith" and therefore permitted Zabell to question the employees as to their basis for filing the suit has no merit. The fact that the Respondent unlawfully questioned the employees about their lawsuit constitutes unlawful interrogation. *Samsung Electronics, LLC*, 363 NLRB No. 105, slip op. at 1 (2016).

The Respondent also correctly asserts that Bindra said that he had to "defend myself" and that he would have to "fight." I find nothing improper with Bindra's remark that he had to defend himself." However his question whether he and the workers are fighting or not fighting constitutes coercive interrogation. He sought an immediate answer from the workers, without the aid of their attorney, as to whether the Respondent paid them properly or did not. And with that answer he posed a further question of whether they would fight each other or not.

Thus, Bindra sought to coercively convince the workers that they had been paid and therefore should not fight him in their lawsuit for proper compensation.

The remarks by Bindra constitute interrogation of the employees he addressed. The Board has held that an interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. Relevant factors include whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. The Board has viewed the fact that the questioner is a high level supervisor as one factor supporting a conclusion that the questioning was coercive. *Brighton Retail, Inc.*, 354 NLRB 441, 448 (2009). *Samsung*, above.

Here, Bindra, the manager of the Respondent and the brother of its owner, questioned its employees immediately after receiving the lawsuit. He stated that he was surprised and "disappointed" that the suit was filed. The fact that he was disappointed clearly establishes that he blamed the employees for suing him and bore animus toward them for engaging in the protected activity of filing the action. He further sought to encourage, if not coerce them, into dropping the lawsuit, asking if they still intended to pursue it.

Thus, no assurances were given concerning the questioning, the interrogation took place in an atmosphere of interference with the Union activities of the workers – the Respondent admitted that it had, on March 10, threatened employees with reprisals and discharge if they selected the Union, and told them that it would be futile to do so. Further, it had discharged three employees for their union activities, and only one week later it unlawfully discharged five more employees for their union activities.

It is clear that Bindra and Miller sought to obtain information about the lawsuit from Reyes, asking him if he knew anything about the lawyer who filed the suit. Reyes denied such knowledge and Bindra coercively continued the questioning by noting that Reyes' name was the first in the list of plaintiffs. The Respondent's effort to obtain information about the lawsuit is unquestionably interrogation. *Samsung*, above. In the meeting with the other employees Bindra attempted to coercively persuade the workers to abandon their lawsuit, and tried to have them discontinue their protected activity of joining together to seek to remedy their allegedly unlawful working conditions. He threatened that he would "fight" them if they continued to engage in the protected activity of pursuing their lawsuit.



JD(NY)-13-16

I accordingly find and conclude, as alleged, that the Respondent interrogated employees about their involvement in the FLSA lawsuit and threatened them with unspecified reprisals because of their involvement in the filing of that lawsuit.

### **The Implementation of New Work Rules and Discipline**

The complaint alleges that the Respondent unlawfully implemented new work rules and discipline regarding cell phone use and lateness.

As set forth above, on July 21, the Respondent implemented new work rules prohibiting cell phone use during work hours and providing discipline for employee lateness.

It is undisputed that this was the first time that written work rules have been imposed on employees. Employee testimony that they understood that they were required to report to work on time or they would be subject to discipline misses the point. First, employees testified that they called their manager to report their lateness and no discipline was issued. Secondly, Argueta's testimony that he was asked to wear a protective belt while using the forklift was not a written rule.

The evidence strongly suggests, and I find, that the rules were implemented in response to the employees' union and protected, concerted activity. Thus, the rules were placed in force on July 21, 2015, only two weeks after Bindra received the FLSA lawsuit and coercively interrogated employees about its contents. Moreover, they were implemented in the context of Miller's strongly anti-union speech to employees, and the Respondent's admitted threats to the workers. Further, the Respondent discharged five of the plaintiffs named in that lawsuit for refusing to sign the new policy.

Moreover, the rules were implemented within the context of the Respondent's commission of violations of the Act in Miller's admitted threats that employees would be discharged if they selected the Union, and that it would be futile to so designate the Union.

### **The Respondent's Defense**

The Respondent argues first, that it began work on the new policy before it received notice that the FLSA suit had been brought. Its witness Aldo Hernandez testified that he edited the policy in mid-June. That may be the case, but the allegation and the violation is that the new policy was *implemented* on July 21. There is no allegation as to the policy's promulgation.

The Respondent asserts that the new rules were implemented in anticipation of its move to a new facility in Bethpage, a larger facility with more forklift machines in an effort to promote safety. However, the evidence establishes that the forklift machines were also used in the former, Syosset facility. It is clear that the new safety rules would apply equally to both facilities. Nevertheless, the new rules were not implemented at the Syosset warehouse.

The Respondent argues that the new rules were an effort to improve safety. Nevertheless, the move took place in late May and the new policy was not implemented for another seven weeks. Miller's testimony that he told the workers that new rules prohibiting cell phones would be in effect when the facility moved cannot be believed. He noted that during those seven weeks employees worked with dangerous equipment wearing their headphones and he "said nothing."

JD(NY)-13-16

Miller's further testimony that employees immediately after the move were "on board" with the new policy but then "got lax" is similarly unbelievable. Clearly, no effort to enforce any policy, oral or written, was made until the employees began their activities in behalf of the Union and filed the FLSA lawsuit. It is clear that if safety was so important to the Respondent it would have implemented its new work rules when it said it would – when it moved to Bethpage.

Further, there was substantial evidence that the conduct of employees in using cell phones and wearing headphones during work hours was condoned at both locations. Tony Bindra stated that the employees "always" wore headphones and that he always told them not to do so but they did not heed his warning.

Miller precisely explained the Respondent's true motive for implementing the new rules. In his speech to the employees on March 10, he told them he felt betrayed "because I always treated everyone right....I give you a lot ... freedom. The phones I don't say anything. If you want change, careful what you ask for. Okay. Because a lot will change....If you are not happy, leave. But stop, don't bring problems for me because I am not going to be happy and if I am not happy you will not be happy.... Someone is putting things in your head but if you want it, if you don't believe me, do what you got to do... You'll see what happens." Miller's promise to change was realized in the unlawful implementation of the new rules.

At the time of Miller's meeting with the workers, the Respondent was located in its former facility in Syosset. It is clear that Miller acknowledged that the employees' cell phone use was not appropriate but he said nothing about it, thereby condoning their use. He clearly related a change in that policy to the advent of the Union. The evidence also establishes that the new rules were put in place in reaction to the recent filing of the FLSA suit.

I accordingly find and conclude that the new work rules were implemented in retaliation for the employees' union activities and because they filed the FLSA lawsuit. *CDR Mfg.*, 324 NLRB 786, 790 (1997). I further find that the Respondent has not met its burden of proving that it would have implemented the new rules even in the absence of the employees' union and concerted activities. *Wright Line*, above.

#### **The Discharges of Henry Hernandez, Marvin Hernandez Roberto Reyes, Javier Reyes and Augustin Sabillon**

I have found, above, that the implementation of the new work rules was unlawful. It is well settled that discharge of employees because they violated an unlawful rule is itself violative of the Act. *Tuscaloosa Quality Foods*, 318 NLRB 405, 411 (1995) and cases cited therein.

In addition, under a *Wright Line* analysis, I find that the five employees who were discharged were all engaged in union activities, and all were named plaintiffs in the FLSA lawsuit which was well known to the Respondent at the time they were discharged. The Respondent's animus toward the employees for filing the lawsuit is established in the coercive interrogation and threats made at the July 15 meeting and in the context of the Respondent's admitted unlawful threats made at Miller's meeting. I therefore find that the General Counsel has established a prima facie showing that their activities was a motivating factor in their discharge.

The Respondent argues that it discharged the five workers because they refused to sign the new work rule policy. It claims that all its employees signed the policy but, as set forth above, it could produce only nine signed forms from the approximately 26 workers employed at

JD(NY)-13-16

the time. There was no evidence that employees who had not signed the form were also discharged.

In addition, the employees testified that they understood that they were supposed to report to work on time and certain employees stated that they knew that they could be disciplined or discharged if they were late often. The Respondent argues that these were work rules that were in place, were understood by the workers and, accordingly, the written implementation of these rules was just a continuation of rules the workers understood and therefore were nothing new. It must be emphasized that there were no written rules of any kind in existence until the implementation of this work rule policy, and that the Respondent tolerated for years the type of conduct prohibited by the new rules. .

The Respondent also claims that these rules promoting safety in the workplace were, themselves, proper rules. That may be true but, as found above, they were unlawfully implemented for unlawful reasons to retaliate against workers.

Nor did the Respondent establish why it had to discharge long-term employees with no record of discipline. It did not consider giving them a written warning or some lesser form of discipline. The fact that it had tolerated the identical conduct suddenly prohibited pursuant to the new rules undermines the Respondent's argument that it was vital that the rules be adhered to immediately.

I accordingly find and conclude that the Respondent has not met its burden of proving that the five employees would have been discharged even in the absence of their activities in behalf of the Union and in participating in the FLSA lawsuit against the Respondent. *Wright Line*, above.

#### **Threats of Legal Action in a Board Hearing Room**

The complaint alleges that on about December 9, Respondent, by its attorney Saul D. Zabell, while in a Board hearing room (a) threatened employees with legal action in retaliation for engaging participating in a Board hearing and because of their Union activity and (b) threatened to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

As set forth above, the Union's witnesses credibly testified, in a mutually corroborative matter to essentially the same facts. Attorney Zabell told the employees that he would report them to the immigration authorities and that they would "not get a penny." He made these statements while the employees were in the hearing room.

Danny Bindra conceded that he heard Zabell tell Powell that if the employees were "illegal," they could not receive a penny due to a case whose name he could not recall. Thus, Bindra admitted that employees were in the room when Zabell made those comments – essentially corroborating the General Counsel's witnesses on that point. It must be noted that Zabell did not testify to refute these allegations.

I thus reject the Respondent's argument that Zabell was simply speaking to his client at the elevator concerning the effect of the employees' immigration status on this case. The evidence is clear, as admitted by Bindra, that he heard a conversation concerning immigration between Zabell and Powell in the hearing room.

JD(NY)-13-16

[T]hreats to employees that election of the union might result in their being reported to Immigration officials and, presumably, possibly deported, may similarly elicit strong fears in the employees. While the record contains no evidence that any of respondent's employees are illegal aliens, should any of them fall within that category, then Allard's threats would undoubtedly evoke the most intense fear, not only of employment loss, but of removal from their very homes as well. Like the fears of job loss discussed above, fears of possible trouble with the Immigration Service or even of deportation must remain indelibly etched in the minds of any who would be affected by such actions on Respondent's part. *Viracon, Inc.*, 256 NLRB 245, 247 (1981).

Here, although there was no effective threat of job loss since the employees had already unlawfully been discharged, nevertheless there were threats by the Respondent through Zabell that he would report them to the Immigration Service and that they would not receive a penny through this proceeding.

I accordingly find and conclude that the Respondent, by Zabell threatened employees with legal action in retaliation for engaging participating in a Board hearing and because of their Union activity and threatened to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

There is no question that employees have an unfettered right to participate in Board proceedings free of threats and intimidating comments by a respondent. The threats were of such a nature that they had a tendency to interfere with the employees' uninhibited right to freely appear at the Board hearing and give testimony.

Threats in a hearing room made to employees therein that an immigration investigation would be requested have been found to be unlawful threats in violation of Section 8(a)(1) of the Act. *AM Property Holding Corp.*, 350 NLRB 998, 1042-1043 (2007) and cases cited therein.

### **The Election**

The election was held on March 24, 2015. Nine valid ballots were cast for the Union and five ballots were cast against the Union. Five ballots were challenged. The ballots cast by Jose Wilfredo Argueta, Jose Martin Torres and Jose Michael Torres, the alleged discriminatees in the unfair labor practice case, were challenged by the Employer. The ballots cast by Amjad Malik and Manjit Singh were challenged by the Union. The Regional Director directed that the hearing concerning all five challenged ballots be consolidated with the unfair labor practice proceeding. The Employer filed Objections to the election which was also consolidated with this proceeding.

JD(NY)-13-16

**The Challenged Ballots**

Inasmuch as I have found, above, that Jose Wilfredo Argueta, Jose Martin Torres and Jose Michael Torres were unlawfully discharged, they remained statutory employees at the time of the election. I therefore direct that their ballots be opened and counted.

Inasmuch as I have found that Amjad Malik was a statutory supervisor and agent, I therefore find that his ballot should not be opened and counted.

Manjit Singh did not testify. The burden is on the challenging party, the Union, to prove that the voter who was challenged is ineligible to vote. Tony Bindra testified that Singh was a warehouse employee and driver who performed the same work as Argueta, Jose Martin Torres and Jose Michel Torres. There was no evidence presented to rebut that testimony. I therefore find that Singh was a member of the unit and eligible to vote. I accordingly direct that the ballot of Manjit Singh should be opened and counted.

**The Objections**

The Respondent filed the following objections to the election:

Prior to the election, and during the course of voting, the Union pressured Imperial's employees to vote in favor of the union. The Union leveraged threats concerning employee's immigration status, along with promises regarding legalizing their immigration situation, to secure favorable votes. Moreover, during the course of the election, the Union, in an apparent effort to bully their way to a desired election outcome, resorted to acts of physical violence against Imperial's agents.

The aforementioned acts have a corrosive effect on the sanctity of a fair election. As such, the NLRB should decline to certify the March 24, 2015 election and should commence an investigation into the improper and unlawful conduct that transpired.

The Regional Director directed that a hearing be held on the allegations "that the Union would call immigration authorities and have employees deported, the promise that a vote for the Union meant employees could stay in the country lawfully, and the intertwined threat by employees that various members would kill an employee if s/he voted against the union because it would mean that they would be deported (which grew from the initial threat by the Union)."

The Director also directed that a hearing be held on the "allegation that a Union representative verbally and physically accosted the Employer's representative in front of employees at the beginning of the election."

JD(NY)-13-16

The Director did not direct that a hearing be held on the allegation that a Union agent engaged in unspecified threats, intimidation and electioneering immediately prior to and at the election.

5                   **The Alleged Threats Regarding Employees' Immigration Status**

10                   Tony Bindra stated that sometime prior to the election one employee told him that he was told by the Union that if he did not vote for it his immigration status would be affected, and he would be deported. Bindra did not identify the Union agent and did not know the alleged victim's name. Bindra also stated that the same employee told him that he was told that a vote for the Union meant that he could remain in the United States legally, and that he would be given a green card.

15                   Manager Miller testified that no employee told him that he was threatened by the Union or that the Union had mentioned anything to the workers about their immigration status.

20                   Union president Mendoza and Union agent Fabres denied speaking to the employees regarding their immigration status. No threats or promises were made regarding their immigration status, and no Union agents told the employees that they would be deported if they did not vote for the Union.

25                   Henry Hernandez denied having any conversations with Union agents or employees concerning their immigration status in relation to their vote in the election. Nor did he recall discussions in which an employee's life was threatened concerning their vote. Jose Michel Torres denied that anyone made any promises to him regarding his immigration status if he voted for the Union.

30                   Employee Marvin Hernandez stated that no Union agents made any statements to him concerning his immigration status if he voted for the Union. Similarly, Sabillon testified that no Union agent promised him anything regarding his immigration status at the time of the election.

35                   Javier Reyes denied that any Union agent made any promises to him concerning his immigration status regarding his vote at the election. No one threatened him with deportation for exercising his rights to join a union.

40                   Roberto Reyes stated that no Union agent told him that how he voted may affect his ability to stay in the United States. Argueta denied being spoken to by anyone concerning his immigration status and its effect on his vote.

45                   Inasmuch as no evidence was presented in support of this Objection it is overruled.

**The Alleged Acts of Verbal and Physical Violence Toward the Respondent's Agents**

45                   As set forth above, the election agreement provided that the election would take place in the warehouse area adjacent to Miller's office by the large west facing loading door at the Employer's facility, and that stated that the Employer agreed to turn off all surveillance cameras for the period of the election, which record the warehouse area adjacent to Herb Miller's office in

50



JD(NY)-13-16

addition to all exits in and out of the area. The controls for the video surveillance system are located in the "blade room" which is near the election polling location.

5 Tony Bindra testified that there was no agreement to shut the cameras during the election, but nevertheless he was told by Zabell to turn them off and he did so.

10 An altercation occurred during the pre-election period before the voting began. During that time, the Employer, Union and Board agent met in the location designated as the polling area.

15 Danny Bindra testified that as he was standing in the polling area before the voting occurred, he observed Union president Mendoza walking toward the warehouse. Bindra stood in front of him putting his hands at chest level and told him that he could not enter the warehouse. Mendoza advanced, aggressively pushing his chest into Bindra's chest with Mendoza's hands on Bindra's shoulders, pushing him back. Mendoza then placed his hand under Bindra's chin, and made a gun gesture with his hand, saying "I'll put you down." Bindra  
20 repeated that he could not enter the warehouse.

Bindra further stated that Mendoza raised his voice, insisting that he was "going to go inside." Bindra told him that he could not do so. At that point, according to Bindra, Zabell stepped between them, repeating that Mendoza could not enter the warehouse. Mendoza  
25 raised his hand, used profanities and told Zabell "what do you think – you're a big guy? I'll put you down too." Zabell repeated that he could not enter the warehouse.

Danny Bindra recounted that Mendoza's chest bumped Zabell's, and then Mendoza  
30 "buted" Zabell's chest with his head. Bindra denied that Zabell put his hands on Mendoza. Bindra estimated that each confrontation, that between him and Mendoza and between Zabell and Mendoza last two to three minutes.

Danny Bindra recalled that twelve to fifteen employees who were 20 to 25 feet away and  
35 were present to vote, saw the altercation. The incidents ended when the Board agent separated Mendoza and Zabell, telling Mendoza to move back. Mendoza then walked to the area where the employees were standing and spoke to them. Danny and Tony Bindra stated that they saw Mendoza look at them and, once, put his finger across his throat, which Danny Bindra  
40 interpreted as a threatening gesture.

Although Danny Bindra testified that he was in fear of his life, he did not call the police. Instead, he gestured at the Board agents who replied that they had an election to conduct, but later amended this testimony to state that the Board agent stepped between Zabell and  
45 Mendoza. Bindra further stated that he asked Zabell if he should call the police and Zabell replied that the Board agents were present. Bindra conceded that he did not file assault or battery charges against Mendoza.

50 Tony Bindra testified that Mendoza "came to me" and said he wanted to "enter my warehouse and go all the way in." In further testimony, Tony Bindra stated that indeed, Mendoza, without saying anything, began walking 20 feet inside the warehouse when Danny



JD(NY)-13-16

told him he could not do so. Bindra specifically stated that Mendoza said nothing about the video system when he walked into the warehouse. He simply sought to walk into the warehouse for no stated reason.

5 In this respect, Bindra's testimony is refuted by manager Miller who testified that the confrontation concerned "an issue about turning the cameras off and the union guy wanted to walk around the warehouse ... it was an issue of the camera before they voted." He stated that Mendoza "tried to follow Tony to shut the cameras off and Zabell asked him to stay where we  
10 were" and not enter the warehouse.

Tony Bindra then saw Mendoza walk up to Danny who told him that he could not enter the warehouse. Then Mendoza pushed Danny and made a gun sign with his hand, telling Danny that he would take him down. Tony Bindra then saw Zabell get between the two men at  
15 which point he observed Mendoza head-butting Zabell's chest, and pushing and shoving Zabell, saying that he would "take care of you, too. He saw Mendoza put his hands on Danny's shoulders, attempting to push him back. He recalled that Mendoza was yelling, screaming and cursing at the time. He first stated that the confrontation lasted a "few minutes" and then stated  
20 that it consumed five to nine minutes.

Tony Bindra noted that 12 to 14 employees were present during this incident and stood about 10 to 20 feet away. However, he also testified that "some of the [workers] were present." When asked how many, he stated that "this was a very heated situation. I didn't know what was  
25 going on so I didn't pay attention to it if there were other people there."

Tony Bindra then said that following the confrontation with Danny, Mendoza went "all the way inside" the warehouse and was stopped by Danny, and then both were engaged in a  
30 physical confrontation.

Miller stated that Mendoza came up to Zabell and when "neck and neck...actually bumped him." Miller added that Mendoza and Zabell were touching each other, with Mendoza threatening him. Miller said all the employees were watching this scene while they were waiting  
35 for the polls to open.

It must be noted that Miller stated that he was 15 to 20 feet away from the confrontation and he could not hear what words were used – "the people were yelling, and you can't make out nothing." He did not hear any "specific words. "Later, when he was recalled by the  
40 Respondent, Miller's memory improved. He stated that he heard Mendoza tell Danny Bindra and Zabell that he would "take [them] down."

Tony Bindra first testified that the altercation lasted a "few minutes" and then said it took place between five and nine minutes. Danny Bindra testified, alternately that it lasted one to  
45 three minutes, then two to three minutes, and then five to nine minutes. Miller stated that the dispute continued for three to five minutes. There is no dispute that when the Board agent came between the men the confrontation ended.

50 Union president Mendoza stated that when he arrived at the polling location an employee told the Board agent there were many surveillance cameras at the warehouse and he

JD(NY)-13-16

pointed at some of them. Mendoza told the Board agent that the cameras should either be shut off or the cameras covered. The Board agent mentioned this to Zabell.

5 Mendoza stated that he asked for proof that the cameras were shut. Zabell said that he would have a manager or owner shut the system. Mendoza protested that either the Union or the Board agent must also be certain that the cameras are shut.

10 At that point, according to Mendoza, Zabell began yelling, saying that he would not permit the Union to "go and make sure the cameras were off." Both he and Zabell raised their voices at each other. Mendoza stated that after he asked to see the cameras, Zabell stepped in front of him, yelling that he could not do so. Mendoza stated that Zabell came toward him and they were inches apart but did not have physical contact.

15 Mendoza testified that the Union was not assured of a fair election if it was not able to ensure that the cameras were shut. He did not take the owner's word that the cameras were rendered inoperable. Mendoza stated that after he was refused permission to check the cameras they continued to argue, but he did not attempt to walk into the Respondent's facility.

20 However he stated that after his request was denied he attempted to walk out of the election area to observe the camera system. He stated that since he did not attempt to walk through the facility the owners did not try to get in his way. He also denied saying "I got you" or that he made a gun gesture with his empty hand.

25 Mendoza stated that he believed that he had a right to "walk around" the shop as he had, in the past, been permitted to enter an employer's premises prior to an election. Mendoza stated that he did not attempt to walk inside the facility. Rather he walked only in the area where the polling area was located. Mendoza denied speaking to or making a throat slashing gesture at the Respondent's agents.

30 According to Mendoza the Board agent told him to bring up the matter after the election if he so chose.

35 Union agent Fabres testified that he did not witness the altercation between Mendoza and Zabell but was told about it later by Mendoza. Fabres further stated that the employees were inside the shop at work at the time of the confrontation

40 Argueta, the Union's election observer, testified that he saw an argument between Zabell and Mendoza. He stated that they got close to each other "like pushing and shoving" but he saw no contact between them. The argument lasted four to five seconds. He denied seeing Mendoza make hand gestures at that time. Argueta stated that none of the employees were present during the argument as they were told to leave the area – to "hide themselves."

45 Employees Roberto Reyes, Jose Michel Torres, Marvin Hernandez, Javier Reyes, and Sabillon denied seeing any argument at the election. In addition, Jose Michel Torres, Marvin Hernandez and Sabillon denied seeing any physical confrontation. As set forth above, Argueta stated that he was the only employee present at the pre-election confrontation.

50 Henry Hernandez did not recall Zabell being at the election, but heard from other workers after the election that Zabell and a Union agent "wanted to like fight."

JD(NY)-13-16

The Respondent subpoenaed Board agent Stephanie LaTour to testify as to the events at the election. The Board granted the General Counsel's petition to revoke the subpoena pursuant to Section 102.118(a)(1) of the Board's Rules and Regulations on the ground that other witnesses were available to testify about the election incident.

### Analysis

#### Objection 1

"It is the Employer's burden, as the objecting party, to prove that there has been misconduct that warrants setting aside the election." *Consumers Energy Co.*, 337 NLRB 752, 752 (2002).

I conclude, based on the above, that no credible evidence has been presented as to the first Objection, that the Union would call immigration authorities and have employees deported, or promised that a vote for the Union meant employees could stay in the country lawfully, or a threat by employees that various members would kill an employee if s/he voted against the union because it would mean that they would be deported.

Here, Tony Bindra's testimony that an unnamed employee told him that an unnamed Union agent threatened him with deportation and said that he could remain the United States if he voted for the Union is simply incredible. No supporting evidence has been presented and each of the employees denied that any such comments had been made.

#### Objection 2

The second Objection alleges that the Union assaulted the Respondent's agents and attorney at the election.

The test for evaluating conduct of a party is an objective one – whether it has the "tendency to interfere with the employees' freedom of choice." *Taylor Wharton Division*, 336 NLRB 157, 158 (2001). In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers: (1) the number of incidents (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit (3) the number of employees in the bargaining unit subjected to the misconduct (4) the proximity of the misconduct to the election (5) the degree to which the misconduct persists in the minds of the bargaining unit employees (6) the extent of dissemination of the misconduct among the bargaining unit employees (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct (8) the closeness of the final vote and (9) the degree to which the misconduct can be attributed to the party.

I note first that the stipulated election agreement provided that the Employer would turn off its surveillance video cameras so that they would not be operating during the election.

Mendoza attempted to ensure that the cameras was turned off, and stated that he did not want to take the Employer's word that it had done so. The Employer attempted to diminish this important aspect of Mendoza's actions by its testimony of Tony Bindra that there was no agreement that it would shut the cameras, and by Danny Bindra's testimony that Mendoza said

JD(NY)-13-16

nothing about the video system and simply wanted to enter the warehouse for no stated reason. It is significant that the Employer's manager Miller stated, in contradiction, that the confrontation arose concerning "an issue of the camera."

5 Accordingly, the Bindra brothers sought to make it appear that Mendoza's actions were a brazen attempt to walk through the warehouse for no reason whereas Mendoza, apparently relying on the election agreement's stipulation that the cameras were to be shut, simply wanted to confirm that fact, and made it known that that was his purpose.

10 Thus, it appears that Mendoza, by his own testimony, was not satisfied with the Employer's assertion that it had shut the cameras, and he attempted to exit the election area to observe the video system, claiming, at hearing, that he had a "right" to "walk around" the shop. Miller gave believable testimony that Mendoza attempted to follow Tony Bindra when he shut the cameras off and that Zabell asked him to "stay where we were" and not enter the  
15 warehouse.

Although I credit Mendoza's testimony that he did not try to walk through the warehouse, the evidence is clear that he did proceed at least to some point at or near the entrance of the warehouse which resulted in the Employer's attempt to stop him. Thus, the alleged misconduct  
20 may be attributed to the Union, a party.

I further find that an argument and confrontation ensued between Danny Bindra, Zabell and Mendoza. The argument included raised voices and profanities. As set forth above, Employer representatives claimed that Mendoza, being the aggressor, made contact with  
25 Danny and Zabell, attempting to push them back. In contrast, Mendoza stated that, although he was "inches apart" from Zabell they made no contact.

I also find, as testified by Argueta, that there was "pushing and shoving." However, he denied that there was contact between the men.

30 The evidence is clear that there was contact between Mendoza, Zabell and Danny Bindra. It is doubtful that angry words between men who were only "inches" away according to Argueta would not result in contact between them especially since he testified that there was "pushing and shoving." However, I find that that the contact was nothing more than the men  
35 pushing each other in the opposite direction. I do not credit the Employer's agents that Mendoza head butted Danny and Zabell in their chests. It is not likely that such an act would have gone without the police being called by Zabell or the Employer or criminal charges being filed by them.

40 In making findings as to what occurred, I similarly cannot credit the Bindras or Zabell's testimony that Mendoza made threatening statements or threatening gestures toward them. Miller did not confirm that testimony and Mendoza and Argueta denied it. It is further noted that Miller at first denied hearing anything that Mendoza said, but later, upon recall by Zabell heard Mendoza's alleged threatening statement.

45 Considering the factors the Board looks at in determining whether Mendoza's conduct had a tendency to interfere with the employees' freedom of choice, only one incident took place – the confrontation between Mendoza, the Bindra brothers and Zabell. The incident occurred in the immediate vicinity of the election.

50 I cannot credit the Employer's evidence that the argument took as long as they said it did. It is unlikely that it lasted even a few minutes. The Board agent intervened and came

JD(NY)-13-16

between the disputants breaking it up and thereafter proceeded with the election. I accordingly find that the confrontation was quite short in duration. In this respect, I credit Argueta's testimony that the dispute lasted a few seconds.

5 In considering whether Mendoza's conduct was likely to cause fear among the employees it must first be determined whether any of the employees were present at the confrontation, and if not, whether that incident was disseminated among employees not present.

10 As set forth above, Danny Bindra and Miller testified that all the voting employees were present at the confrontation. However, Tony Bindra first stated that some employees were present. When asked how many, he said "this was a very heated situation. I didn't know what was going on so I didn't pay attention to if there were other people there." He later testified that all the employees were present. However, all the employees other than Argueta, the Union's election observer, denied that they were present or saw any arguments or confrontations.

15 In view of my credibility findings, above, in which I discredited the Bindra others as to material parts of their testimony, I cannot credit the Employer's agents that all the employees were present and observed the confrontation. Thus, I find that only Argueta was present. He described the dispute as "pushing and shoving," lasting only a few seconds.

20 Further, regarding the dissemination of the incident, Henry Hernandez stated that he heard from other workers after the election that Zabell and a Union agent "wanted to like fight." Hernandez did not testify as to how many other employees spoke about this matter and he gave no further details as to what he heard. In any event, the dissemination took place after the election and thus could not have affected the employees before they voted.

25 There was no evidence as to whether the incident persisted in the minds of the unit employees, particularly since I find that employees, other than Argueta, were not present at the incident. There is no evidence that dissemination of the incident to the employees occurred before the election.

30 As to the effect, if any, of misconduct by the Employer, I credit Mendoza's testimony that Zabell stood in his way, stopping him from proceeding further. Thus, it appears that Zabell placed his body in front of Mendoza's, with both equally contributing to the physical contact which I find occurred. Accordingly, if Mendoza was originally at fault for attempting to proceed toward the warehouse, Zabell was equally at fault for blocking his way, causing the physical contact between them.

35 It is not possible to determine the closeness of the final vote since five ballots were challenged and I direct, below, that four of them be opened. However, nine valid votes were cast for the Union and five were cast against it. Nine votes against five is not a close vote.

40 I find that the incident which occurred did not reasonably tend to interfere with the employees' free and uncoerced choice in the election. The incident was not directed at the employees, there is no credible evidence that any more than one employee, Argueta, the Union's election observer, witnessed the incident, and there is no evidence that the incident was disseminated to the other employees or that it persisted in their minds.

45 In addition, I cannot find that, in observing the incident, Argueta was given the impression that the Employer was "powerless against the force of the union." Rather, as in *Chrill*



JD(NY)-13-16

Care, Inc., 340 NLRB 1016, 1016-1017 (2003), where the union's agent disrupted an employer meeting with employees and initially resisted the employer's efforts to eject her. I find that the Employer here, as was the employer in *Chrill Care*, "fully able to maintain control" by resisting Mendoza's attempt to proceed toward the warehouse. As was the case in *Chrill Care*, the union agent left the area when the police were called. Here, Mendoza backed away when the Board agent intervened.

The cases cited by the Employer, *Service Employees District 1199 (Staten Island University Hospital)*, 339 NLRB 1059, 1061 (2003) and *Central Massachusetts Joint Board*, 123 NLRB 590, 609 (1959) are inapposite. In *Staten Island University Hospital*, the union's agent engaged in a "series of open confrontations with managers" which consisted of "deliberate, repeated and unprovoked verbal abuse, including profanity, racial and sexual slurs and threats of physical harm." The Board found that the union's actions violated Section 8(b)(1)(A) of the Act. It also found that the hospital's employees, who were fully aware of the agent's actions, would reasonably tend to fear that they would be subject to the same abusive tactics if they failed fully to support the union in its bargaining position and the impending strike. The Board further found that the agent's intent in engaging in this "prolonged ... repeated harassment was to "send this intimidating message to the hospital employee audience."

In *Central Massachusetts*, the Board found that the union agent's threatening with bodily harm and kicking an employer official as he crossed the union's picket line violated Section 8(b)(1)(A) of the Act. The Board held that the striking employees could have reasonably regarded the assault "as a reliable warning of what might befall them if they abandoned the strike" and restrained and coerced them in their exercise of their right to continue or discontinue striking as they wished.

The question here is whether the employees would reasonably fear that they would be subject to similar misconduct if they chose to fail to support the Union. I find that they would not harbor such a fear. Rather, I find that, Argueta, the sole witness to the incident, would reasonably believe that Mendoza was demonstrating his reasonable belief that the Union was entitled to ensure that the surveillance cameras were shut as agreed in the election stipulation, and that Mendoza was correct in asserting that he had a right to confirm that the cameras were turned off. Argueta could therefore reasonably believe that the resulting confrontation took place because of the Employer's challenge to Mendoza's attempt to verify that the cameras were deactivated.

In sum, I view the election as reflecting the employees' free choice and I overrule this Objection.

JD(NY)-13-16

### Conclusions and Recommendations

Based on the above discussion, the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh should be opened and counted. The ballot of Amjad Malik should not be opened and counted.

I shall remand the proceedings in Case No. 29-RC-146077 to the Regional Director and direct him to open and count the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh, and issue a revised tally of ballots.

If the revised tally of ballots shows that a majority of the valid votes cast at the election were cast for the Petitioner, I recommend that the Petitioner be certified. If the revised tally of ballots shows that the Petitioner has lost the election, I recommend that the election be set aside, and that all proceedings in Case No. 29-RC-146077 be vacated.

### Conclusions of Law

1. The Respondent, Deep Distributors of Greater NY, Inc. d/b/a The Imperial Sales, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon.

3. The Respondent violated Section 8(a)(1) of the Act by giving its employees the impression that their Union activities were under surveillance by the Respondent.

4. The Respondent violated Section 8(a)(1) of the Act by threatening its employees with unspecified reprisals if they selected the Union as their collective bargaining representative.

5. The Respondent violated Section 8(a)(1) of the Act by telling its employees that it would be futile to select the Union as their collective bargaining representative.

6. The Respondent violated Section 8(a)(1) of the Act by threatening its employees with discharge if they selected the Union as their collective bargaining representative.

7. The Respondent violated Section 8(a)(1) of the Act by interrogating its employees about their involvement in a Fair Labor Standards Act lawsuit.

8. The Respondent violated Section 8(a)(1) of the Act by threatening its employees with unspecified reprisals because of their involvement in the filing of a Fair Labor Standards Act lawsuit.

9. The Respondent violated Section 8(a)(1) of the Act by implementing new work rules and discipline regarding cell phone use and lateness.

10. The Respondent violated Section 8(a)(1) of the Act, while in a Board hearing room, it threatened employees with legal action in retaliation for participating in a Board hearing and because of their Union activity.



JD(NY)-13-16

11. The Respondent violated Section 8(a)(1) of the Act, while in a Board hearing room, it threatened to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

12. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning Section 2(6) and (7) of the Act.

### The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully implemented new work rules on July 21, 2015 regarding cell phone use and lateness, I shall order that it rescind those new work rules.

The Respondent having discriminatorily discharged and refused to reinstate Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon, it must offer them reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed, absent the discrimination against them. Further, I shall recommend that the Respondent make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In accord with *Tortillas Dan Chavas*, 361 NLRB No.10 (2014), my recommended Order also requires the Respondent to (1) submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the employees, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse her for any additional Federal and State income taxes she may be assessed as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year.

In accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB No. 9, slip op. at 5-6 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. *J. Piccini Flooring*, above, slip op. at 3. See *Teamsters Local 25*, 358 NLRB No. 15 (2012).

The General Counsel requests that the order in this case should include a requirement that Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon be reimbursed for their search for work and work-related expenses, without regard to whether interim earnings are in excess of

JD(NY)-13-16

these expenses. Normally, such expenses are considered an offset to interim earnings. However, the General Counsel seeks a change in existing rules regarding such expenses. This would require a change in Board law, which is solely within the province of the Board and not an administrative law judge. Therefore, I shall not include this remedial proposal in my recommended order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

### ORDER

The Respondent, Deep Distributors d/b/a The Imperial Sales, Inc., Bethpage, New York, its officers, agents, successors, and assigns, shall

1.Cease and desist from:

(a) Discharging employees because they engaged in union activities, concerted activities, and because they filed a lawsuit pursuant to the Fair Labor Standards Act

(b) Giving its employees the impression that their Union activities were under surveillance.

(c) Threatening its employees with unspecified reprisals if they selected the Union as their collective bargaining representative.

(d) Telling its employees that it would be futile to select the Union as their collective bargaining representative.

(e) Threatening its employees with discharge if they selected the Union as their collective bargaining representative.

(f) Interrogating its employees about their involvement in a Fair Labor Standards Act lawsuit.

(g) Threatening its employees with unspecified reprisals because of their involvement in the filing of a Fair Labor Standards Act lawsuit.

(h) Implementing new work rules and discipline regarding cell phone use and lateness.

(i) Threatening employees with legal action in retaliation for participating in a Board hearing and because of their Union activity.

---

<sup>10</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

JD(NY)-13-16

(j) Threatening to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

5 (k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

10 (a) Within 14 days from the date of the Board's Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs, or if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

15 (b) Make Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

20 (c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon in writing that this has been done and that their discharges will not  
25 be used against them in any way.

(d) Within 14 days after service by the Region, post at its facility in Bethpage, New York, copies of the attached notice marked "Appendix." <sup>11</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized  
30 representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps  
35 shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17,  
40 2015.

(e) Rescind the work rules entitled "Employee Code of Conduct" which was implemented on March 21, 2015, and notify the employees that it has done so.

45 \_\_\_\_\_

<sup>11</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the national Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the  
50 National Labor Relations Board."

JD(NY)-13-16

5 (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

10 (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

**IT IS FURTHER ORDERED AS FOLLOWS:**

15 1. The Objections to the election are hereby overruled.

2. The proceedings in Case No. 29-RC-146077 are hereby remanded to the Regional Director for Region 29. He is directed to open and count the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh, and issue a revised tally of ballots.

20 3. If the revised tally of ballots shows that a majority of the valid votes cast at the election were cast for the Petitioner, I recommend that the Petitioner be certified. If the revised tally of ballots shows that the Petitioner has lost the election, I recommend that the election be set aside, and that all proceedings in Case No. 29-RC-146077 be vacated.

25 Dated, Washington, D.C. May 6, 2016

30 

Steven Davis  
Administrative Law Judge

JD(NY)-13-16

**APPENDIX  
NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

**WE WILL NOT** discharge you because of your union and concerted activities and because you filed a lawsuit pursuant to the Fair Labor Standards Act.

**WE WILL NOT** give you the impression that your Union activities were under surveillance.

**WE WILL NOT** threaten you with unspecified reprisals if you select United Workers of America, Local 660 as your collective bargaining representative.

**WE WILL NOT** tell you that it would be futile to select the Union as your collective bargaining representative.

**WE WILL NOT** threaten you with discharge if you select the Union as your collective bargaining representative.

**WE WILL NOT** interrogate you about your involvement in a Fair Labor Standards Act lawsuit.

**WE WILL NOT** threaten you with unspecified reprisals because of your involvement in the filing of a Fair Labor Standards Act lawsuit.

**WE WILL NOT** unlawfully implement new work rules and discipline regarding cell phone use and lateness.

**WE WILL NOT** threaten you with legal action in retaliation for participating in a Board hearing and because of your Union activity.

**WE WILL NOT** threaten to report you to Government authorities in order to intimidate you as a witness and to discourage you from participating in Board processes.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

**WE WILL** within 14 days from the date of the Board's Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs, or if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any

JD(NY)-13-16

other rights or privileges previously enjoyed.

WE WILL make Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon in writing that this has been done and that their discharges will not be used against them in any way.

WE WILL immediately rescind the unlawfully implemented new work rules which were put in effect on July 21, 2015 regarding cell phone use and lateness.

DEEEP DISTRIBUTORS d/b/a/  
THE IMPERIAL SALES, INC.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

Two MetroTech Center, Suite 1500, 5th Floor, Brooklyn, NY 11201-3838  
(718) 330-7713, Hours: 9 a.m. to 5:30 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/29-CA-147909](http://www.nlr.gov/case/29-CA-147909) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (718) 330-2862.

JD(NY)-13-16  
Brooklyn, NY

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS  
BOARD DIVISION OF JUDGES  
NEW YORK OFFICE**

**DEEP DISTRIBUTORS OF GREATER NY D/B/A THE  
IMPERIAL SALES, INC.**

**and**

**29-CA-147909**

**UNITED WORKERS OF AMERICA, LOCAL 660**

**DEEP DISTRIBUTORS OF GREATER NY D/B/A THE  
IMPERIAL SALES, INC.**

**and**

**29-CA-157108**

**HENRY HERNANDEZ, AN INDIVIDUAL**

**and**

**DEEP DISTRIBUTORS OF GREATER NY D/B/A THE  
IMPERIAL SALES, INC.**

**and**

**29-RC-146077**

**UNITED WORKERS OF AMERICA, LOCAL 660**

**ORDER MODIFYING ORDER IN PREVIOUS DECISION**

My Decision dated May 6, 2016 inadvertently omitted a ruling on the General Counsels' request for enhanced remedies which was received in evidence as G.C. Exhibit 3. On May 16, 2016, the General Counsels filed a Motion to Modify Order, requesting that I modify the Order in that Decision by granting their request for enhanced remedies.

After due consideration, I have granted the Motion in some respects and denied the Motion in other respects. I have amended the Remedy, Order and Notice portions of the Decision dated May 6, 2016, which should be substituted for the original Remedy, Order and Notice in the Decision dated May 6, 2016, as follows:

**The Remedy**

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unlawfully implemented new work rules on July 21, 2015 regarding cell phone use and lateness, I shall order that it rescind those new work rules.

The Respondent having discriminatorily discharged and refused to reinstate Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon, it must offer them reinstatement to their



former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they would have enjoyed, absent the discrimination against them. Further, I shall recommend that the Respondent make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In accord with *Tortillas Dan Chavas*, 361 NLRB No.10 (2014), my recommended Order also requires the Respondent to (1) submit the appropriate documentation to the Social Security Administration so that when backpay is paid to the employees, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse them for any additional Federal and State income taxes they may be assessed as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year.

The General Counsel requests an Order that Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon be reimbursed for their search for work and work-related expenses, without regard to whether interim earnings are in excess of these expenses. Normally, such expenses are considered an offset to interim earnings. However, the General Counsel seeks a change in existing rules regarding such expenses.

This would require a change in Board law, which is solely within the province of the Board and not an administrative law judge. Therefore, I shall not include this remedial proposal in my recommended order. The Board has recently stated that it will not order such relief at this time. *Goodman Logistics, LLC*, 363 NLRB No. 177, fn. 2 (2016).

In accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB No. 9, slip op. at 5-6 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. *J. Piccini Flooring*, above, slip op. at 3. See *Teamsters Local 25*, 358 NLRB No. 15 (2012).

The General Counsel has requested certain enhanced remedies. In *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003), the Board, citing *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995), stated that it "may order enhanced or extraordinary remedies when the Respondent's unfair labor practices are 'so numerous, pervasive, and outrageous' that such remedies are necessary to 'dissipate fully the coercive effects of the unfair labor practices found.'" Especially since a small bargaining unit is involved, "the probable impact of [the] unfair labor practice is increased." *Excel Case Ready*, 334 NLRB 4, 5 (2001).

In addition, the Board has found that a broad order requiring a respondent from engaging in misconduct "in any other manner," instead of a narrow order to refrain from misconduct "in any like or related manner" is necessary when a respondent has engaged in

"such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357 (1979).

In addition, in such cases, the Board has ordered a respondent to furnish periodic, updated lists of employee names and addresses to the union, so that the union can help to counteract the effects of these violations in its communications with employees, and to enable the union to "present its message in an atmosphere relatively free of restraint and coercion." *Federated Logistics*, above, at 258; *Excel Case Ready*, above, at 5.

Further, the Board has required the public reading, by an official of the respondent, of a notice to its employees, so that "they will fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007).

The publication of the Notice to Employees has been found an appropriate remedy in cases such as this one. *Pacific Beach Hotel*, 361 NLRB No. 65 (2014).

I find that all of the above enhanced remedies are necessary to dissipate the serious unfair labor practices which the Respondent engaged in. As set forth above, shortly after the Union began organizing the employees, the Respondent immediately embarked on a campaign to identify the Union's supporters. The Respondent learned that Jose Michel Torres and Alex Argueta were union adherents and discharged them, along with Jose Michel Torres' brother, Jose Martin Torres. Later, after five other employees filed a FLSA lawsuit, the Respondent discharged them for not signing its unlawfully implemented rules concerning lateness and cell phone use.

The Respondent's admitted violations of the Act by threatening employees with unspecified reprisals, telling employees that it would be futile to select the Union, and threatening them with discharge if they voted for the Union, all constitute serious violations of the Act.

Finally, and most egregiously, the Respondent attorney's threat to employees in the hearing room that he would report them to immigration authorities and that if they testified they would be committing fraud constituted extraordinary intimidation of the employee witnesses. Not only did it instill fear in them that they may be reported to governmental authorities, but it conveyed the message that if they gave testimony they would be in legal jeopardy.

Accordingly, I find that the General Counsel has established good cause for the imposition of the above enhanced remedies, and I shall order that the Respondent be required to undertake them.

However, I will not order two additional special remedies requested by the General Counsel. The General Counsel requests an Order that the Respondent be required to "schedule training for all employees on their rights under the Act conducted by a Board agent during paid work time; and an Order requiring the Respondent to schedule training for all supervisors and managers on compliance with the Act conducted by a Board agent during paid work time. No Board precedent has been cited for the imposition of such Orders, and no detail has been given concerning the nature or length of the training

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

### ORDER

The Respondent, Deep Distributors d/b/a The Imperial Sales, Inc., Bethpage, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discharging employees because they engaged in union activities, concerted activities, and because they filed a lawsuit pursuant to the Fair Labor Standards Act.

(b) Giving its employees the impression that their Union activities were under surveillance.

(c) Threatening its employees with unspecified reprisals if they selected the Union as their collective bargaining representative.

(d) Telling its employees that it would be futile to select the Union as their collective bargaining representative.

(e) Threatening its employees with discharge if they selected the Union as their collective bargaining representative.

(f) Interrogating its employees about their involvement in a Fair Labor Standards Act lawsuit.

(g) Threatening its employees with unspecified reprisals because of their involvement in the filing of a Fair Labor Standards Act lawsuit.

(h) Implementing new work rules and discipline regarding cell phone use and lateness.

(i) Threatening employees with legal action in retaliation for participating in a Board hearing and because of their Union activity.

(j) Threatening to report employees to Government authorities in order to intimidate witnesses and to discourage them from participating in Board processes.

---

<sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(k) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

1. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon in writing that this has been done and that their discharges will not be used against them in any way.

(d) Rescind the work rules entitled "Employee Code of Conduct" which was implemented on July 21, 2015, and notify the employees that it has done so.

(e) Within 14 days after service by the Region, hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance, at which the attached Notice to Employees" to the employees shall be read to employees by Danny Bindra, Tony Bindra, Herb Miller or Amjad Malik in English and in Spanish during work time, or at the Respondent's option, by a Board agent in the presence of the Respondent's officials, supervisors and agents named above.

(f) Within 14 days from the date of this Order, publish in three publications of general local interest and circulation copies of the attached Notice to Employees, signed by the Respondents' general manager Tony Bindra, or his successor, and to do so at its expense. Such Notice shall be published twice weekly for a period of 8 weeks. The publications shall be determined by the Regional Director for Region 29, and need not be limited to newspapers so long as they will achieve broad coverage of the area.

(g) Upon the request of the Union, immediately furnish it with lists of the names, addresses, and classifications of all the Respondent's employees as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during a period of 2 years following the entry of this Order.

(h) Within 14 days after service by the Region, post at its facility in Bethpage, New York,

copies of the attached notice marked "Appendix." <sup>2</sup> Copies of the notice, in English and in Spanish, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 2015.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

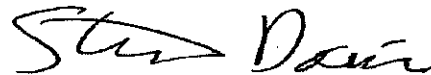
**IT IS FURTHER ORDERED AS FOLLOWS:**

1. The Objections to the election are hereby overruled.

2. The proceedings in Case No. 29-RC-146077 are hereby remanded to the Regional Director for Region 29. He is directed to open and count the ballots of Jose Wilfredo Argueta, Jose Martin Torres, Jose Michel Torres, and Manjit Singh, and issue a revised tally of ballots.

3. If the revised tally of ballots shows that a majority of the valid votes cast at the election were cast for the Petitioner, I recommend that the Petitioner be certified. If the revised tally of ballots shows that the Petitioner has lost the election, I recommend that the election be set aside, and that all proceedings in Case No. 29-RC-146077 be vacated.

Dated, Washington, D.C. May 25, 2016



Steven Davis  
Administrative Law Judge

<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the national Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**APPENDIX**

**NOTICE TO EMPLOYEES**

**Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT discharge you because of your activity in behalf of United Workers of America, Local 660, or your concerted activities or because you filed a lawsuit pursuant to the Fair Labor Standards Act.

WE WILL NOT give you the impression that your Union activities were under surveillance.

WE WILL NOT threaten you with unspecified reprisals if you select United Workers of America, Local 660 as your collective bargaining representative.

WE WILL NOT tell you that it would be futile to select the Union as your collective bargaining representative.

WE WILL NOT threaten you with discharge if you select the Union as your collective bargaining representative.

WE WILL NOT interrogate you about your involvement in a Fair Labor Standards Act lawsuit.

WE WILL NOT threaten you with unspecified reprisals because of your involvement in the filing of a Fair Labor Standards Act lawsuit.

WE WILL NOT unlawfully implement new work rules and discipline regarding cell phone use and lateness.

WE WILL NOT threaten you with legal action in retaliation for participating in a Board hearing and because of your Union activity.

WE WILL NOT threaten to report you to Government authorities in order to intimidate you as a witness and to discourage you from participating in Board processes.

WE WILL NOT in any other manner interfere with, restrain, or coercing you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes,



Javier Reyes, and Augustin Sabillon full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify Jose Wilfredo Argueta, Jose Martin Torres, Jose Michael Torres, Henry Hernandez, Marvin Hernandez, Roberto Reyes, Javier Reyes, and Augustin Sabillon in writing that this has been done and that their discharges will not be used against them in any way.

WE WILL immediately rescind the unlawfully implemented new work rules entitled "Employee Code of Conduct" which were implemented on July 21, 2015 regarding cell phone use and lateness, and notify the employees that we have done so.

WE WILL within 14 days after service by the Region, hold a meeting or meetings during working time, scheduled to ensure the widest possible attendance, at which the attached Notice to Employees to the employees shall be read to employees by Danny Bindra, Tony Bindra, Herb Miller or Amjad Malik in English and in Spanish during work time, or at the Respondent's option, by a Board agent in the presence of the Respondent's officials, supervisors and agents named above.

WE WILL within 14 days from the date of this Order, publish in three publications of general local interest and circulation copies of the attached Notice to Employees, signed by the Respondent's general manager Tony Bindra, or his successor, and to do so at its expense. Such Notice shall be published twice weekly for a period of 8 weeks. The publications shall be determined by the Regional Director for Region 29, and need not be limited to newspapers so long as they will achieve broad coverage of the area.

WE WILL upon the request of the union, immediately furnish it with lists of the names, addresses, and classifications of all the Respondent's employees as of the latest available payroll date, and furnish a corrected, current list to the Union at the end of each 6 months thereafter during a period of 2 years following the entry of this Order.

DEEEP DISTRIBUTORS d/b/a/  
THE IMPERIAL SALES, INC.

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).



JD(NY)-13-16

Two MetroTech Center (North), Jay Street and Myrtle Avenue, Suite 5100

Brooklyn, New York 11201-3838

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/29-CA-147909](http://www.nlr.gov/case/29-CA-147909) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, 718-330-2862

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

-----X  
**Local 660, United Workers of America,**

**Complainant,**

**Case Nos.: 29-CA-147909 &  
157108 & 146077**

**and**

**Deep Distributors of Greater NY d/b/a  
The Imperial Sales Inc.,**

**Respondent.**

-----X

**RESPONDENT'S EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respondent, by and through the undersigned Counsel, asserts the following exceptions to the findings, conclusions, remedies and orders of the Administrative Law Judge at the citations to the Judge's Decision set forth below:

**1. ALJD p. 1 Statement of case**

The ALJ's finding that he based his decision on charges and amended charges filed by United Workers of America, Local 660, and Henry Hernandez against Deep Distributors of Greater NY d/b/a The Imperial Sales on October 30, 2015.

**2. ALJD p. 3, lines 5-6**

The ALJ's statement that he made his decision based upon his observations and considering the briefs of all parties.

**3. ALJD p. 3, lines 28-30 and footnote 3**

The ALJ's findings as to Respondent's hierarchy and characterizations of arguments made at trial regarding corporate entities.

**4. ALJD p. 4, lines 4-6**

The ALJ's findings that Miller was in charge of a discreet area of the Warehouse.

**5. ALJD p. 4, lines 50**

The ALJ's findings that Malik occupies a position of trust.

**6. ALJD p. 30, lines 30**

The ALJ's findings that the Union filed a petition seeking to represent Respondent's warehouse employees.

**7. ALJD p. 5, lines 40-43**

The ALJ's findings Argueta testified credibly, when in the same sentence, the ALJ concedes that he must discount the same testimony.

**8. ALJD p. 4-5, Footnote 4**

The ALJ's findings that Reyes rehabilitated the multiple instances of dishonesty and inconsistency found in his testimony.

**9. ALJD p. 6, lines 23-34**

The ALJ's findings and mischaracterizations of testimony that work was not slow while the remaining employees testified that their individual workloads increased after the layoffs and the identification of new employee hires without identifying the date(s) of hire which spans an approximate six (6) month period of time.

**10. ALJD p. 6, lines 44-46**

The ALJ's findings that it was reasonable for Miller to have been aware that the Union was seeking to organize Respondent's workers.

**11. ALJD p. 7, lines 22-24**

The ALJ's findings that Jose Michael Torres was not subject to employee discipline.

**12. ALJD p. 8, lines 7-9**

The ALJ's findings that the month of March does not follow the Christmas holiday in time.

**13. ALJD p. 8, lines 15-37**

The ALJ's findings that Bindra could not provide definitive testimony regarding terminations and layoffs experienced by Respondent in the five (5) year period of time leading up to, and including, the year three (3) employees were laid off in March of 2015, as well as the detailed financial information provided regarding sales volume.

**14. ALJD p. 9, lines 10-27**

The ALJ's abrupt and inconsistent application of the Federal Rules of Evidence as a means by which to exclude Respondents' use of documentation introduced by Counsel for the General Counsel.

**15. ALJD p. 9-10, footnote 6**

The ALJ's findings that inconsistencies in testimony are immaterial.

**16. ALJD p. 11, lines 39-47**

The ALJ's findings that a tape recording was accurate simply because it was accompanied by a transcript of the recording, without allowing substantial questioning or access to the original recording as a means by which to determine authenticity.

**17. ALJD p. 13, lines 9-14**

The ALJ's selective manipulation of facts as a means by which to substantiate testimony of events occurring in the aftermath of a taped meeting discredits prior testimony that the allegations contained in a Fair Labor Standards Act lawsuit were admitted to be false.

**18. ALJD p. 14, lines 14-16**

The ALJ's findings that subpoenaed time records were not produced.

**19. ALJD p. 14, lines 44-45**

The ALJ's findings that employees had never been disciplined before, or that their discharge for refusing to abide by safety and attendance policies admitted to be reasonable was, in any way, inappropriate.

**20. ALJD p. 14-15, lines 50-6**

The ALJ's findings that a subpoena was not complied with regarding the number of employees who signed new employee policies and accepting as accurate Counsel for the General Counsel's blatant misrepresentations regarding subpoena production and that no documentation was provided to support Respondent's claim.

**21. ALJD p. 15, lines 35-36**

The ALJ's findings that employees were not told that if they refused to accept the attendance and cell phone policies they would be terminated.

**22. ALJD p. 16, lines 24-26**

The ALJ's findings that employees credibly testified as to what they heard and that they understood what was said.

**23. ALJD p. 16-17, lines 40-2**

The ALJ's findings that Argueta's repeated, consistent and substantial inconsistencies do not undermine his testimony.

**24. ALJD p. 18, Footnote 8**

The ALJ's findings that Mendoza's testimony which was obviously false alleging that the ALJ witnessed statements that the ALJ disavowed does not render the testimony of Mendoza unbelievable.

**25. ALJD p. 17, footnote 9**

The ALJ's findings that Fabres' admittedly inaccurate testimony is immaterial and does not undermine his testimony.

**26. ALJD p. 18, lines 24-37**

The ALJ's findings that despite numerous acknowledged inconsistencies in content, dates, locations, and identities, General Counsel's employee witnesses were worthy of credit and the unlawful discounting of their direct responses to questions about their specific allegations of the complaint.

**27. ALJD p. 18-19, lines 39-6**

The ALJ's findings that Respondents' testimony was not credible when he refused to permit clarification of questions and further, allowed General Counsel's unintelligible questions to be asked of witnesses and his attempts to embarrass Respondents' witnesses in retaliation for seeking clarification of those questions.

**28. ALJD p. 19, lines 45-47**

The ALJ's findings that there is as much work to perform in each respective area of the warehouse without any basis for the conclusion.

**29. ALJD p. 30, lines 30-35**

The ALJ's findings that Torres and Argueta believed that their activities were under surveillance.

**30. ALJD p. 21, lines 5-20**

The ALJ's findings that there can be no doubt as to Febres' purpose.

**31. ALJD p. 21-22, lines 25-6**

The ALJ's findings that the General Counsel has met their burden of proving motivating

factor, three (3) employees were discharged for Union activity, Respondent harbored animosity toward the Union, and their existed the impression or suggestion of surveillance.

**32. ALJD p. 22, lines 4**

The ALJ's findings that Respondent has not met its burden of establishing the layoff of Argueta, Torres and Torres were for economic reasons.

**33. ALJD p. 22, lines 20-40**

The ALJ's findings that the documents introduced by the General Counsel did not establish that the first quarter of the last five years resulted in employee layoffs and that the financial records introduced by General Counsel did not support the financial basis for the layoffs.

**34. ALJD p. 23, lines 5-10**

The ALJ's findings that employee misconduct was condoned by the Respondent and therefore should be condoned by the Board.

**35. ALJD p. 23, lines 10-20**

The ALJ's findings that a three week overlap in employment connotes anything other than an overlap.

**36. ALJD p. 23-24, lines 45-8**

The ALJ's findings that employees were threatened with unspecified reprisals and Discharge.

**37. ALJD p. 24, lines10-25**

The ALJ's findings that employees were interrogated and threatened with unspecified reprisals concerning their involvement in a FLSA suit.

**38. ALJD p. 26-27, lines 5-31**

The ALJ's findings that the implementation in written form of existing work rules was in



response to protected activity and a violation of the Act.

**39. ALJD p. 28, lines 34-40**

The ALJ's findings that employees testified consistently regarding allegations of threats made in the hearing room.

**40. ALJD p. 29, lines 19-33**

The ALJ's findings that employees were threatened with legal action in retaliation for participating in a Board hearing and because of their Union activity.

**41. ALJD p. 36, lines 16-20**

The ALJ's findings crediting the testimony of Mendoza.

**42. ALJD p. 36-37, lines 30-5**

The ALJ's findings that despite admitted physical contact and cursing by Mendoza, that it was short in duration.

**43. ALJD p. 37, lines 15-20**

The ALJ's findings that Argueta was present during the physical confrontation prior to the Union Election.

**44. ALJD p. 37, lines 30-40**

The ALJ's findings that Zabell was responsible for the physical altercation prior to the election.

**45. ALJD p. 37, lines 40-51**

The ALJ's findings that the physical altercation prior to the election did not interfere with the employee's free and non-coerced choice in the election.

**46. ALJD p. 38, lines 48-49**

The ALJ's findings that the election reflected employees' free choice and its overruling the

objection interposed during the hearing.

**47. ALJD p. 4, lines 4-6**

The ALJ's findings that Miller was in charge of a discreet area of the Warehouse.

**48. ALJD p. 39, Conclusions of Law and Recommendations in their entirety.**

The ALJ's findings that Respondent violated Sections 8(a)(1), (3) and (5) of the Act.

**49. ALJD p. 40, The Remedies in their entirety.**

**50. ALJD p. 41, The Order in its entirety.**

**51. ALJD Order Modifying Order in Previous Decision in its entirety.**

Dated: Bohemia, New York  
June 22, 2016

**ZABELL & ASSOCIATES, P.C.**  
*Attorneys for Respondent*

By: 

Saul D. Zabell  
**ZABELL & ASSOCIATES, P.C.**  
1 Corporate Drive, Suite 103  
Bohemia, New York 11716  
Tel.: (631) 589-7242  
Fax: (631) 563-7475  
[szabell@laborlawsny.com](mailto:szabell@laborlawsny.com)